(14)

No. 95-1956-CFX Title: Department of the Interior, et al., Petitioners
v.
South Dakota, et al.

Docketed: June 4, 1996 Court: United States Court of Appeals for the Eighth Circuit

Entry	Date	Proceedings and Orders
	Apr 22 1996	Application (A95-869) to extend the time to file a petition for a writ of certiorari from May 2, 1996 to June 3, 1996, submitted to Justice Thomas.
	Apr 23 1996	Application (A95-869) granted by Justice Thomas extending the time to file until June 3, 1996.
	Jun 3 1996	Petition for writ of certiorari filed. (Response due July 4, 1996)
	Jul 2 1996	Brief amicus curiae of Three Affiliated Tribes of Fort Berthold Reservation, et al. filed.
	Jul 2 1996	Brief amicus curiae of Minnesota Chippewa Tribe filed.
	Jul 2 1996	Brief amicus curiae of San Manuel Band of Mission Indians filed.
	Jul 3 1996	Brief amici curiae of Assiniboine and Sioux Tribes of Fort Peck Reservation, et al filed.
	Jul 3 1996	Brief amici curiae of Shakopee Mdewakanton Sioux (Dakota) Community, et al. filed.
	Jul 5 1996	Brief of respondents South Dakota, et al. in opposition filed.
	Jul 5 1996	Brief amici curiae of Confederated Salish and Kootenai Tribes, et al. filed.
	Jul 5 1996	Brief amici curiae of Cherokee Nation of Oklahoma, et al. filed.
	Jul 5 1996	Brief amicus curiae of Lower Brule Sioux Tribe filed.
	Jul 5 1996	Brief amici curiae of Jicarilla Apache Tribe, et al. filed.
	Jul 17 1996	DISTRIBUTED. September 30, 1996
	Aug 30 1996	Reply brief of petitioners United States Department of Interior, et al. filed.
	Oct 7 1996	REDISTRIBUTED. October 11, 1996
	Oct 15 1996	Petition GRANTED. Judgment VACATED and case REMANDED with instructions to vacate the judgment of the United States District Court for the District of South Dakota and remand the matter to the Secretary of the Interior for reconsideration of his administrative decision. Dissenting opinion by Justice Scalia with whom Justice O'Connor and Justice Thomas join. (Detached opinion.)

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Supreme Court, U.S.
FILED

No. 95 1956 JUN 3 1996

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
PETITIONERS

v.

STATE OF SOUTH DAKOTA AND CITY OF OACOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. 465, which authorizes the Secretary of the Interior to acquire interests in real property "for the purpose of providing land for Indians," is an unconstitutional delegation of legislative power.

PARTIES TO THE PROCEEDING

Petitioners are the United States Department of the Interior, Eddie F. Brown, in his official capacity as Assistant Secretary of Indian Affairs, and Jerry Jaeger, in his official capacity as Acting Area Director, Bureau of Indian Affairs. Respondents are the State of South Dakota and the City of Oacoma, South Dakota.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Department of the Interior, *et al.*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-30a) is reported at 69 F.3d 878. The memorandum opinion and judgment of the district court (App., *infra*, 31a-54a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1995. A petition for rehearing was

denied on February 2, 1996. App., *infra*, 63a. On April 23, 1996, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including June 3, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I of the United States Constitution states in pertinent part as follows:

> All legislative Powers herein granted shall be vested in a Congress of the United States.

U.S. Const. Art. I, § 1.

Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.*, states as follows:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo

> Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.
>
> The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.
>
> Title to any lands or rights acquired pursuant to [provisions of this Act] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. 465.

STATEMENT

Respondents State of South Dakota and City of Oacoma sued the United States Department of the Interior under Section 10 of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* They challenged the Department's decision to place 91 acres of land, which the Lower Brule Sioux Tribe had purchased in fee, in trust status pursuant to Section 5 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. 461 *et seq.* See IRA § 5, 25 U.S.C. 465. The United States District Court for the District of South Dakota determined that the APA does not waive the Department's sovereign immunity in the circumstances presented here, and it rejected respondents' contentions that Section 5 is unconstitutional. The court of appeals reversed that decision. Without reaching the statutory issues, the court held that Section 5 of the IRA is an unconstitutional delegation of legislative power.

1. Since the formation of the Union, the United States has recognized Indian Tribes as domestic dependent nations that possess power to govern their

members and their territory. See *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831). Nevertheless, at the close of the nineteenth century, Congress adopted a policy, reflected in the Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887), of dismantling Indian tribal governments, allotting parcels of tribal land to individual members, and conveying "surplus" tribal land to non-Indians. Under that policy, the Indians were expected to become farmers or ranchers and assimilate into the non-Indian culture. See *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 253-254 (1992).

Congress's policy of allotting Indian land "quickly proved disastrous for the Indians." *Hodel* v. *Irving*, 481 U.S. 704, 707 (1987). It ultimately resulted in a large-scale transfer of Indian lands out of Indian ownership, which undermined tribal communities and impoverished the Tribes and their members. See *id.* at 707-708; F. Cohen, *Handbook of Federal Indian Law* 136-138 (1982). As a result of the allotment program, total Indian landholdings diminished from 138 million acres in 1887 to 48 million acres in 1934. See *County of Yakima*, 502 U.S. at 255-256; *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess. 16 (1934) (Memorandum of John Collier, Commissioner of Indian Affairs).

Congress responded to the failure of its allotment policy by enacting the IRA in 1934. See ch. 576, 48 Stat. 984. The IRA's "overriding purpose" was "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974). The Act sought "to rehabilitate the Indian's economic life and to give

him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934)); see also *Iowa Mutual Ins. Co.* v. *LaPlante*, 480 U.S. 9, 14 n.5 (1987); *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983); *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 168 (1980) (Brennan, J., concurring in part and dissenting in part); *id.* at 180 (Rehnquist, J., concurring in part and dissenting in part); *Fisher* v. *District Court*, 424 U.S. 382, 386 (1976).

Congress recognized that Indian Tribes could not maintain their political and economic self-sufficiency unless they were able to retain, protect, and supplement their land base. Accordingly, the IRA expressly discontinued the allotment program (IRA § 1, 25 U.S.C. 461); it extended indefinitely the existing periods of the government's trust with respect to Indian lands (IRA § 2, 25 U.S.C. 462); it authorized the Secretary of the Interior to restore unallotted surplus reservation lands to Indian ownership (IRA § 3, 25 U.S.C. 463); and it limited the sale or transfer of restricted Indian land (IRA § 4, 25 U.S.C. 464). Of particular interest in this case, Section 5 of the IRA authorizes the Secretary to take real property into trust on behalf of Tribes and individual Indians. 25 U.S.C. 465. By authorizing new trust acquisitions, Section 5 allows the Department of the Interior to restore or replace the lands and related economic opportunities that were lost through the allotment process. See *County of Yakima*, 502 U.S. at 255.

In 1980, the Department of the Interior issued detailed regulations governing the Secretary's reso-

lution of tribal requests under Section 5 to place Indian-owned land in trust status. See generally 25 C.F.R. Pt. 151.[1] Those regulations state a general policy regarding trust land acquisitions, 25 C.F.R. 151.3, and they specify particular factors, derived from Congress's statutory purposes and the Secretary's experience in implementing the IRA, that guide the Secretary's review of land acquisition requests, 25 C.F.R. 151.10. Those factors include: (1) the Indians' need for additional land; (2) the purposes for which the land will be used; (3) the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls; and (4) jurisdictional problems and potential conflicts that may arise. 25 C.F.R. 151.10.[2]

The question has arisen from time to time whether the Department of the Interior's land acquisition decisions under Section 5 are subject to judicial review under Section 10 of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* The Department initially took the view that those decisions are unreviewable because they are "committed to agency discretion by law." 5 U.S.C. 701(a)(2). See IRA § 5,

[1] The regulations were originally codified at 25 C.F.R. Part 120a (1981) and were recodified in 1982 at 25 C.F.R. Part 151. See 47 Fed. Reg. 13,326, 13,327 (1982).

[2] In June 1995, the Department of the Interior revised the regulations to identify additional factors bearing on off-reservation acquisitions (25 C.F.R. 151.10), to formalize the Department's practice of notifying affected state and local governments of proposed acquisitions and providing an opportunity for response (25 C.F.R. 151.11(d)), and to provide a consultation process to resolve regulatory disputes between Indian Tribes and States (*ibid.*). See 60 Fed. Reg. 32,874, 32,877 (1995).

25 U.S.C. 465 (authorizing the Secretary, "in his discretion," to acquire land in trust). The Department has since concluded, however, that although Section 5 confers discretion, the exercise of that discretion is not entirely unreviewable. The Department of the Interior has accordingly determined (and the Department of Justice agrees) that a decision to acquire land in trust under Section 5 of the IRA is subject to judicial review under the APA, see 5 U.S.C. 706 (2), taking into account the factors identified in the Secretary's regulations as relevant in making such decisions.

In conjunction with that determination, the Department of the Interior has promulgated a procedural regulation to provide an opportunity for judicial review before the land is actually taken into trust. See Land Acquisitions (Nongaming), 61 Fed. Reg. 18,082 (1996) (to be codified at 25 C.F.R. 151.12), *reprinted at* App., *infra*, 64a-69a. That regulation states that the Secretary must provide public notice of a final decision to acquire land in trust at least thirty days before the formal transfer of title to the United States. *Id.* at 69a. A person who objects to the Secretary's land acquisition decision will then have an opportunity during that period to file a judicial challenge before the formal conveyance of the property to the United States in trust. Once the property is actually conveyed to the United States, however, a suit seeking to disturb title would be barred, because the Quiet Title Act (QTA), 28 U.S.C. 2409a, "does not apply to trust or restricted Indian lands." 28 U.S.C. 2409a(a). See *United States* v. *Mottaz*, 476 U.S. 834 (1986); *Block* v. *North Dakota*, 461 U.S. 273, 284-285 (1983).

2. This case arises out of the Lower Brule Tribe's request that the Department of the Interior place a

parcel of tribal land into trust status pursuant to Section 5 of the IRA. The Lower Brule Tribe occupies a Reservation within central South Dakota. Congress established the original boundaries of the Reservation in 1889 through the Sioux Allotment Act (Act of Mar. 2, 1889, ch. 405, 25 Stat. 888), which divided the Great Sioux Reservation into several smaller reservations, effected the cession of 9 million acres of "surplus" tribal land, and provided for allotment of the remaining land. See *Irving*, 481 U.S. at 706-707. The Lower Brule Reservation originally consisted of 446,500 acres. But as a result of the allotment process and other programs (including federal condemnations for flood control), the Lower Brule Reservation has since been reduced to approximately 235,800 acres. Only 119,900 acres remain in Indian ownership or in federal ownership for Indian use. See *Lower Brule Sioux Tribe* v. *South Dakota*, 917 F. Supp. 1434, 1441 (D.S.D. 1996).[3]

In 1990, the Tribe purchased a 91-acre parcel of land from a private landowner to develop an industrial park. The parcel is located seven miles south of the Lower Brule Sioux Reservation, partially within the City of Oacoma, and near the site of the original Lower Brule Bureau of Indian Affairs (BIA) Agency. After completing the purchase, the Tribe submitted a letter to the Lower Brule BIA Agency requesting that the United States place that parcel in trust. The BIA sent a letter to respondents informing them of the Tribe's request and inviting

[3] Of those 119,900 acres, the federal government holds 76,700 acres in tribal trust. The federal government owns 13,200 acres for Indian use, while 30,000 acres are allotted lands. See 917 F. Supp. at 1441.

comments on the proposal. The State and City objected to the request on a variety of grounds. See App., *infra*, 2a, 32a-34a.

The BIA's Superintendent for the Lower Brule Agency evaluated the Tribe's request under the factors set out in 25 C.F.R. 151.10 and recommended approval of the Tribe's request. App., *infra*, 37a. The BIA's Aberdeen Area Director also found the acquisition consistent with applicable agency regulations and recommended to the Assistant Secretary of the Interior for Indian Affairs that the Tribe's application be approved. *Id.* at 40a. On December 13, 1990, the Assistant Secretary for Indian Affairs, on behalf of the Secretary, formally approved the Tribe's request, subject to receipt of satisfactory evidence of title. *Id.* at 40a, 61a-62a. Respondents petitioned the Interior Board of Indian Appeals (IBIA) to review the Assistant Secretary's decision, but the IBIA dismissed the appeal. *Id.* at 2a; *South Dakota* v. *Aberdeen Area Director, Bureau of Indian Affairs*, 22 I.B.I.A. 126 (1992) (*reprinted at* App., *infra*, 55a-60a).[4]

3. On July 13, 1992, respondents filed a complaint in the United States District Court for the District of South Dakota against the Department of the Interior and other individual defendants challenging the Assistant Secretary's decision. App., *infra*, 2a. Invoking the APA, respondents contended that the Department's approval of the Tribe's application was arbitrary, capricious and an abuse of discretion. See

[4] The IBIA determined that it lacked "jurisdiction to review decisions made by the Assistant Secretary, which are final for the Department of the Interior unless the Assistant Secretary provides otherwise in his decision." App., *infra*, 58a-59a (citing 25 C.F.R. 2.6(c)).

5 U.S.C. 706(2)(A). They also argued that the approval violated the Tenth Amendment and the IRA. See Complaint 7-9 (July 13, 1992).

Respondents took no action, beyond the filing of the complaint, to prevent the transfer of the parcel into trust, and on November 30, 1992, the United States formally acquired title to the land in trust for the Tribe. See App., *infra*, 3a, 40a. More than one year later, on January 31, 1994, respondents filed an amended complaint that raised an additional constitutional challenge to Section 5. Respondents asserted that Section 5 "constitutes an unlawful delegation of legislative power from Congress to the Executive Branch and therefore the acquisition of land under this statute in this case was unlawful and unconstitutional." Amended Complaint 10 (Jan. 31, 1994).

In accordance with the federal government's position at that time, the Department moved to dismiss the action on the ground that the APA did not authorize judicial review. The Department argued that the decision whether to acquire land in trust under Section 5 is "committed to agency discretion by law," 5 U.S.C. 701(a)(2). See App., *infra*, 41a. The district court, however, did not reach that question. The court ruled, *sua sponte*, that it lacked jurisdiction to review the Secretary's decision to place the land in trust status because Congress had not waived the sovereign immunity of the United States with respect to disputes over title to Indian trust land. App., *infra*, 41a-46a, 51a.

The district court pointed out that "the APA waives sovereign immunity for review of administrative action only to the extent that another statute does not expressly or impliedly forbid suit." App., *infra*, 42a. See 5 U.S.C. 702 ("Nothing herein * * *

confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."). The court ruled that because the QTA waives the federal government's immunity from quiet title actions, but "does not apply to trust or restricted Indian lands," 28 U.S.C. 2409a(a), the APA preserves that immunity from suit in this case. App., *infra*, 42a-46a (following *Florida Dep't of Business Regulation* v. *United States Dep't of Interior*, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986)).[5]

The district court determined that it did have jurisdiction to consider respondents' constitutional challenges, but it ruled that they were without merit. App., *infra*, 47a-51a. The court concluded that the Tenth Amendment does not limit Congress's power to take land into trust on behalf of Indian Tribes and that the acquisition in this case was consistent with that power. *Id.* at 47a-49a. The court also rejected respondents' argument that Section 5 of the IRA amounts to an unlawful delegation of legislative power. The court concluded that "the context in which [Section 5] was passed clearly delineates the general policy to be applied and the bounds of that delegated authority." *Id.* at 51a (citing *Mistretta* v. *United States*, 488 U.S. 361, 372-373 (1989)).

4. a. A divided court of appeals reversed the district court's decision. App., *infra*, 1a-30a. The court expressed "doubt whether the Quiet Title Act pre-

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[5] The court noted that respondents (unlike the typical plaintiffs in a quiet title action) did not assert any ownership rights, but that their suit "would disrupt the trust relationship between the United States and Indians to the same extent as if [respondents] were asserting a property interest in the trust land." App., *infra*, 43a; see also *id.* at 45a-46a.

cludes APA review of agency action by which the United States *acquires* title." *Id.* at 4a n.1. But it concluded that it did not need to reach that issue. The court ruled that the QTA "does not bar claims 'that the Secretary acted unconstitutionally,'" *ibid.* (quoting *Florida Dep't of Business Regulation*, 768 F.2d at 1255 n.9), and it concluded that Section 5 is an unconstitutional delegation of legislative power, see *id.* at 4a-15a.

The court of appeals recognized that Article I of the Constitution, which vests Congress with all "legislative Powers herein granted," U.S. Const. Art. I, § 1, "does not prevent Congress from obtaining the assistance of its coordinate Branches." App., *infra*, 5a. And it noted this Court's repeated admonition that it is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Id.* at 6a (citations omitted). But the court believed that Section 5 "requires a particularly close look" because the federal government had argued in the district court that the Secretary of the Interior's decisions under Section 5 are "committed * * * entirely to agency discretion." *Ibid.*

The court of appeals concluded that Section 5, construed according to "its literal terms," is unconstitutional, because it "delegates unrestricted power to acquire land from private citizens for the private use and benefit of Indian tribes or individual Indians." App., *infra*, 7a. The court characterized Section 5 as containing "no 'intelligible principle,' no 'boundaries' by which the public use underlying a particular acquisition may be defined and judicially reviewed." *Id.* at 9a. The court acknowledged that the legislative history of Section 5 "suggests that Congress did not intend to delegate unrestricted power to acquire land 'for Indians.'" *Ibid.* But the court reasoned:

> Those who drafted [Section 5] failed to incorporate the limited purpose reflected in the legislative history. Presumably, they either drafted poorly or ignored the delegation issue. The agency that received this inartful delegation then used the absence of statutory controls to claim unrestricted, unreviewable power.

Id. at 14a. The court found it "hard to imagine a program more at odds with separation of powers principles." *Ibid.*

b. Judge Murphy dissented. App., *infra*, 15a-30a. She first observed that the majority should have adhered to the "cardinal principle" that courts resolve statutory questions respecting their jurisdiction and the availability of judicial review before "stretch[ing] to consider the constitutionality of the underlying statute." *Id.* at 16a. Judge Murphy pointed out that resolution of the APA issues could eliminate the need to address constitutional questions and would, at a minimum, "inform the analysis of the delegation issue." *Id.* at 16a-17a. She specifically criticized the majority for "rel[ying] on the Secretary's mere assertion that his decision is unreviewable to support its conclusion that the delegation is unlawful." *Id.* at 17a; see also *id.* at 22a.

Judge Murphy further expressed the view that even if it were appropriate to reach the constitutional issue, the majority's decision "strays far from the existing path of nondelegation doctrine." App., *infra*, 17a; see *id.* at 17a-19a (reviewing the case law).

She found the majority's analysis unpersuasive because it "invalidat[ed] a statute as an unlawful delegation based on the broadest possible reading of its terms," *id.* at 19a-20a, and it disregarded the limiting principles expressed through the IRA's historical context, the Act's legislative history, and the Department of the Interior's implementing regulations, *id.* at 20a-24a. Judge Murphy noted that the majority based its analysis on hypothetical situations (such as the purchase of "the Empire State Building in trust for a tribal chieftain as a wedding present") that bore no resemblance to the record before the court. *Id.* at 24a-25a. Rejecting the majority's reasoning, she concluded that Section 5 is a "principled and proper" delegation of authority. *Id.* at 26a.

Finally, Judge Murphy addressed the statutory issues that the majority had left undecided. Unlike the district court, she concluded that the QTA does not bar a judicial action that merely seeks review of the Department's administrative decision to take land into trust. App., *infra*, 26a-30a. Judge Murphy declined to state a definitive view on whether the Department's decision to take land in trust is committed to agency discretion. She concluded that the district court, which did not resolve that issue in its earlier decision, should address that issue in the first instance on remand. *Id.* at 30a.

5. The federal government filed a petition for rehearing with suggestion for rehearing en banc. The court of appeals denied that request. App., *infra*, 63a. Four of the eleven active members of that court dissented from the denial of rehearing en banc. *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals' holding that Section 5 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. 465, is unconstitutional invalidates an Act of Congress that, for more than 60 years, has played a central role in promoting tribal self-government and economic self-sufficiency. That ruling, which departs from this Court's decisions respecting the nondelegation doctrine, clearly warrants this Court's review.

Moreover, recent developments further undermine the ruling below. The court of appeals premised its decision on the assumption that the Secretary's decision to acquire land in trust is not subject to judicial review. Since the court rendered its decision, however, the Secretary has issued a regulation that acknowledges the availability of judicial review of such decisions and affords an opportunity for judicial review to be instituted before the land is actually taken in trust.

In these circumstances, we suggest that this case be remanded to the Secretary for reconsideration and entry of a new administrative decision that specifically discusses the factors identified in the Secretary's regulations as relevant to determinations under Section 5. If the Secretary decides to take the land at issue in trust, respondents may seek judicial review of that decision. The court in such an action may then consider any remaining nondelegation challenge that respondents might present, in light of the Secretary's implementing regulations and the availability of judicial review. But whether the Court remands the case for these purposes, or instead grants plenary review, the constitutional ruling below should not stand unreviewed.

1. The IRA is one of the most important congressional enactments affecting Indians, "equaled in

scope and significance only by the [Trade and Intercourse Act] of June 30, 1834, and the General Allotment Act of February 8, 1887." F. Cohen, *Handbook of Federal Indian Law* 84 (1942) (footnote omitted); Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 Mich. L. Rev. 955 (1972).[6] Section 5 is a central component of the IRA. For more than 60 years, Section 5 has provided the primary mechanism for the federal government to restore and replace tribal lands, which Congress concluded was crucial in promoting tribal self-government and economic self-sufficiency. See, *e.g.*, H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6-7 (1934); 78 Cong. Rec. 11,727, 11,730, 11,732 (1934) (statements of Rep. Howard).

The court of appeals' holding that Section 5 is unconstitutional presents an issue of fundamental importance. Under the court of appeals' view, the Secretary has no authority to take Indian land in trust, notwithstanding the express congressional au-

[6] The IRA can aptly be described as the cornerstone of modern federal law respecting Indians. Numerous statutes build on its fundamental policies of supporting tribal governments and protecting tribal lands. See 25 U.S.C. 450f *et seq.* (Indian Self-Determination Act), 2201 *et seq.* (Indian Land Consolidation Act), 2501 *et seq.* (Tribally Controlled Schools Act of 1988), 2601 *et seq.* (Indian Education Act of 1988), 2701 *et seq.* (Indian Gaming Regulatory Act), 2901 *et seq.* (Native American Languages Act), 3001 *et seq.* (Native American Graves Protection and Repatriation Act), 3101 *et seq.* (National Indian Forest Resources Management Act), 3301 *et seq.* (Higher Education Tribal Grant Authorization Act), 3501 *et seq.* (Energy Policy Act of 1992, Pub. L. No. 102-486, Tit. XXVI, 106 Stat. 3113), 3601 *et seq.* (Indian Tribal Justice Act), 3701 *et seq.* (American Indian Agricultural Resource Management Act), 3901 *et seq.* (Indian Lands Open Dump Cleanup Act of 1994).

thorization contained in Section 5. This Court has previously reviewed decisions involving the interpretation of the IRA, including decisions involving the application of Section 5. See *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973). The Court should likewise grant certiorari in this case, in which a court of appeals has declared that core provision of the IRA unconstitutional. See, *e.g.*, *United States* v. *Gainey*, 380 U.S. 63, 65 (1965) (granting certiorari "to review the exercise of the grave power of annulling an Act of Congress").

The decision below has great practical significance to the Secretary's day-to-day administration of the IRA. We have been informed by the Department of the Interior that there are 439 pending applications to the Secretary to take land in trust. The court of appeals' ruling calls into question the Secretary's authority to do so. In addition, the decision below calls into question thousands of acquisitions (covering an estimated 9 million acres) that the Secretary has made under Section 5 during the past 60 years. Challenges to such acquisitions might be raised in a broad range of cases in which the trust status of land may be relevant, including those concerning state and tribal taxation, land-use regulation, and law enforcement jurisdiction. See, *e.g.*, *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992) (state taxation of non-trust lands); *Brendale* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (zoning of non-Indian lands); 18 U.S.C. 1151 *et seq.* (federal prosecution of offenses occurring in "Indian country").[7]

[7] We do not concede, of course, that collateral attacks on the United States' trust title to land should be entertained in

Finally, the court of appeals' decision warrants this Court's review because it conflicts with the Court's established jurisprudence. As Judge Murphy correctly noted, and as we explain below, the majority's decision prematurely reaches a constitutional issue, departs from familiar principles governing constitutional adjudication, and ultimately "strays far from the existing path of nondelegation doctrine." App., *infra*, 17a.

2. "Judging the constitutionality of an Act of Congress is properly considered 'the gravest and most delicate duty that this Court is called upon to perform.'" *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985). The Court has accordingly admonished that before "reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision." *E.g.*, *Jean* v. *Nelson*, 472 U.S. 846, 854 (1985). That "fundamental rule of judicial restraint" expresses a "doctrine more deeply rooted than any other in the process of constitutional adjudication." *Ibid.* The court of appeals nevertheless elected to decide this case on the theory that Section 5 violates the nondelegation doctrine, without deciding the statutory issues that may have obviated the need for a constitutional ruling. See App., *infra*, 4a n.1.[8]

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the sorts of cases cited in the text, but the prospect of numerous attempts to do so exacerbates the uncertainty occasioned by the court of appeals' constitutional ruling.

[8] As Judge Murphy explained in her dissent, "[r]esolution of the constitutional question would not be required if the merits of the APA claims were to be determined in favor of [respondents]." App., *infra*, 16a. And even if the constitutional issues could not have been avoided, an analysis of the APA issues—including the availability of judicial review—

The court of appeals not only reached the constitutional issue prematurely, but it also did not analyze that issue in light of the customary respect shown for "the duly enacted and carefully considered decision of a coequal and representative branch of our Government." *Walters*, 473 U.S. at 319. As this Court has explained, Congress may vest discretionary authority in Executive Branch officials so long as "Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta* v. *United States*, 488 U.S. 361, 372-373 (1989). In applying that standard, the courts must, by necessity, construe the underlying statute. But in doing so, the courts are obliged to observe the "cardinal principle" that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The court of appeals did not follow that course here. It instead concluded that it was obligated by its past precedents to construe Section 5 "as broadly as possible." App., *infra*, 13a.[9]

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would have "inform[ed] the analysis of the delegation issue since the availability of judicial review of an agency action is relevant in determining whether the authorizing statute is a lawful delegation." *Id.* at 17a. See *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 219 (1989).

[9] The court of appeals' approach is a clear departure from this Court's practice. As the Court observed in *Mistretta*:

> In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.

488 U.S. at 373 n.7.

Furthermore, in yet another departure from this Court's settled practice, the court of appeals based its analysis on extremely unlikely hypothetical situations, rather than on the circumstances presented by this case or the Secretary's administration of Section 5 generally. See App., *infra*, 7a-9a. As this Court has stated, "[t]he fact that [a legislative] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). The court of appeals nevertheless relied on conjecture and its own speculative assessment of "opportunities for abuse" (App., *infra*, 13a) in other settings, without regard to the specific facts presented by this case.

Having departed from the orderly process of constitutional adjudication, the court of appeals reached the extraordinary conclusion on the merits that Section 5 of the IRA violates the nondelegation doctrine, notwithstanding the more than 60 years of experience in acquiring land in trust under its authority. That decision is contrary to the numerous rulings of this Court, which have consistently upheld broader grants of authority to Executive officials. See *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 219 (1989). The Court's decision in *Skinner* cites pertinent examples (*id.* at 218-219): *Lichter* v. *United States*, 334 U.S. 742, 778-786 (1948) (War Department authorized to recover "excessive profits" earned on military contracts); *Yakus* v. *United States*, 321 U.S. 414, 420 (1944) (Price Administrator authorized to fix prices of commodities that "will be generally fair and equitable and will effectuate the purposes" of the congressional enactment); *FPC* v. *Hope*

Natural Gas Co., 320 U.S. 591, 600-601 (1944) (Federal Power Commission authorized to determine just and reasonable rates); *NBC* v. *United States*, 319 U.S. 190, 225-226 (1943) (Federal Communications Commission authorized to regulate broadcast licensing as the "public interest, convenience, or necessity" require).

"Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby* v. *United States*, 500 U.S. 160, 165 (1991). Like the statutes involved in the foregoing cases, Section 5 of the IRA is constitutional because it provides "an intelligible principle to which the person or body authorized to [exercise the statutory authority] is directed to conform." *Mistretta*, 488 U.S. at 372 (quoting *J.W. Hampton Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928)). As in the foregoing cases, the "intelligible principle" is found here by examining the terms of the challenged provision in light of "the purpose of the Act, its factual background and the statutory context in which they appear." *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 104 (1946).

As this Court has explained, Congress enacted the IRA to restore and promote Indian self-government and economic self-sufficiency. See *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. at 154. It fashioned the Act specifically to reverse the "disastrous" effects of the General Allotment Act, which had weakened tribal organizations and had resulted in the wholesale loss of tribal lands. See *Hodel* v. *Irving*, 481 U.S. 704, 706 (1987). Those objectives are expressed in the

IRA's preamble (ch. 576, 48 Stat. 984) and embodied throughout its provisions, which create an integrated framework that is designed to fulfill "Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.'" *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143 (1980).

Section 5 is an integral part of the IRA. The IRA's objectives and corollary provisions accordingly provide the "intelligible principle[s]" that limit Section 5's reach. Section 5 authorizes the Secretary of the Interior to acquire land in trust, in accordance with the complementary provisions of the IRA, to support Indian self-government and economic development. See, *e.g.*, *Jones*, 411 U.S. at 157 (noting that the Mescalero Apache Tribe acquired land "beyond its reservation borders for the purpose of carrying on a business enterprise as anticipated by [Sections 16 and 17] of the Act").

The court of appeals is accordingly mistaken in concluding that Section 5 grants the Secretary unbounded authority to acquire land "for Indians" without regard to the purpose of the acquisition. App., *infra*, 7a-9a, 11a. To the contrary, it allows the Secretary to acquire land in circumstances such as the situation presented here, where the Tribe seeks to develop an industrial park to promote tribal economic enterprise and vocational opportunities. The court's conjecture that Section 5 would, for example, "permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present" (*id.* at 7a) is not only far-fetched, but manifestly wrong.[10]

[10] The legislative history confirms that Section 5 does not contain a boundless delegation of authority, but instead provides a mechanism for restoring and replacing trust lands that were lost through the allotment program, and for facilitating the economic enterprise to which the IRA as a whole is directed. S. Rep. No. 1080, 73d Cong., 2d Sess. 1-2 (1934); accord H.R. Rep. No. 1804, *supra*, at 1, 6-7.

The Secretary of the Interior has recognized that Section 5 does not confer boundless discretion. He has promulgated implementing regulations that articulate specific factors governing the exercise of his authority. See 25 C.F.R. Pt. 151; page 6, *supra*. By setting out ascertainable standards that govern his trust acquisition decisions, the Secretary has not only observed, but has given concrete expression to, the IRA's limiting principles. These regulations, which are described in Judge Murphy's dissent, App., *infra*, 24a n.2, confine the Secretary's exercise of Section 5 authority within constitutional bounds.[11]

3. Although the Court should grant the petition for a writ of certiorari, it might conclude that plenary review is not necessary at this time. Intervening developments suggest that a remand would be appropriate.

The court of appeals identified the availability of judicial review of the Secretary's trust acquisitions

[11] Significantly, Congress conducts regular oversight of the Secretary's activities, and it has revisited and amended the IRA since the promulgation of those regulations. See Indian Reorganization Act Amendments of 1994, Pub. L. No. 103-263, § 5(b), 108 Stat. 709; Indian Reorganization Act Amendments of 1990, Pub. L. No. 101-301, § 3(b) and (c), 104 Stat. 207; Indian Reorganization Act Amendments of 1988, Pub. L. No. 100-581, Tit. I, § 101, 102 Stat. 2938; see also Indian Land Consolidation Act, 25 U.S.C. 2201 *et seq.* (extending, through 25 U.S.C. 2202, Section 5's reach to all Tribes). Congress has not expressed any disapproval of the Secretary's understanding of his Section 5 authority.

as an important factor bearing on the constitutional nondelegation issue presented here. App., *infra*, 6a; see also *Skinner*, 490 U.S. at 219; *American Power & Light Co.*, 329 U.S. at 105; *Touby*, 500 U.S. at 170 (Marshall, J., concurring). Accordingly, as Judge Murphy explained in dissent (App., *infra*, 22a), the court should have squarely resolved whether judicial review is available before reaching the constitutional question. But it did not do so. Instead, the court of appeals merely assumed that a decision by the Secretary under Section 5 to take land in trust "is not subject to judicial review under the APA because it is 'committed to agency discretion.'" App., *infra*, 11a; see *id.* at 6a, 14a. The federal government made such an argument in the lower courts, and the court of appeals based its assumption of non-reviewability on the government's argument.[12] The federal government has since abandoned the position on which the court of appeals based its assumption, and the Secretary of the Interior has issued a final regulation that acknowledges and affords an opportunity for judicial review of his Section 5 decisions. See *id.* at 64a-69a.[13] Under these circumstances, it would be

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[12] See App., *infra*, 6a (stating that the constitutional issue "requires a particularly close look" because "the Secretary argued to the district court that his actions under [Section 5] may not be judicially reviewed").

[13] The regulation (to be codified at 25 C.F.R. 151.12(b)) states:

> Following completion of the Title Examination provided in § 151.13 of this part and the exhaustion of any administrative remedies, the Secretary shall publish in the Federal Register, or in a newspaper of general circulation serving the affected area[,] a notice of his/her decision to take land into trust under this part. The notice will state that a final agency determination to take land in trust has been made and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published.

App., *infra*, 68a-69a. As explained in the preamble, the regulation "ensures that [judicial] review is available before formal conveyance of title to land to the United States, when the QTA's bar to judicial review becomes operative." *Id.* at 66a.

appropriate for this Court to grant the petition, vacate the judgment of the court of appeals, and remand the case in light of that development. See 28 U.S.C. 2106.[14]

We further suggest such a remand be made with instructions that the judgment of the district court sustaining the Secretary's decision also be vacated and that the matter, in turn, be remanded to the Secretary of the Interior for reconsideration and issuance of a new administrative decision. Such a new decision by the Secretary could specifically address the factors that the Secretary's implementing regulations require to be considered in making deter-

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[14] The Court has followed that course in a variety of contexts, including cases presenting new or changed administrative interpretations of federal statutes, see, *e.g.*, *Lawrence* v. *Chater*, 116 S. Ct. 604, 607 (1996) (per curiam); *Schmidt* v. *Espy*, 115 S. Ct. 43 (1994); *City of Chicago* v. *Environmental Defense Fund*, 113 S. Ct. 486, 487 (1992), and confessions of error or other positions newly taken by the Solicitor General, see, *e.g.*, *Wells* v. *United States*, 114 S. Ct. 1609 (1994); *Reed* v. *United States*, 114 S. Ct. 1289 (1994); *Chappell* v. *United States*, 494 U.S. 1075 (1990); *Polsky* v. *Wetherill*, 403 U.S. 916 (1971).

minations under Section 5.[15] If the Secretary decides to acquire the land at issue here in trust, respondents may then seek judicial review of that decision. In such an action, the court not only could consider whether the Secretary's decision was consistent with Section 5 and the implementing regulations, but also could address any nondelegation argument respondents might then raise in light of those regulations and the availability of judicial review.[16]

If the Court does not dispose of the case in this manner, however, it should set the case for plenary consideration. The court of appeals has held an Act of Congress unconstitutional, and that holding is of broad and critical importance in the day-to-day administration of Indian affairs and the self-governance and economic development of Indian Tribes.

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[15] Under the government's former position that the Secretary's decision was not subject to judicial review, there was no occasion for the Secretary's 1992 decision at issue here to contain a discussion of those factors.

[16] If the judgment of the court of appeals were vacated but the judgment of the district court were allowed to stand, title presumably would be in the United States pursuant to the Secretary's decision that the district court sustained. The result would be to present the question in further judicial proceedings below of whether the Quiet Title Act precludes some or all judicial review after title has vested in the United States. Vacatur of the district court's judgment and remand of the matter to the Secretary for a new decision (which would in turn be subject to judicial review under the APA *before* title passed to the United States) would obviate any need to consider that QTA/preclusion question.

CONCLUSION

The petition for a writ of certiorari should be granted. The judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals with instructions to vacate the judgment of the district court and remand the matter to the Secretary of the Interior for reconsideration of his administrative decision. In the alternative, the Court should grant plenary review and set the case for briefing and argument.

Respectfully submitted.

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JUNE 1996

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2344

STATE OF SOUTH DAKOTA;
CITY OF OACOMA, SOUTH DAKOTA,
PLAINTIFFS-APPELLANTS

v.

UNITED STATES DEPARTMENT OF THE INTERIOR;
EDDIE F. BROWN,
Assistant Secretary—Indian Affairs;
JERRY JAEGER, Acting Area Director,
Bureau of Indian Affairs,
DEFENDANTS-APPELLEES

Submitted Feb. 15, 1995

Decided Nov. 7, 1995

Before: MAGILL, LOKEN, and MURPHY, Circuit Judges.

LOKEN, Circuit Judge.

The State of South Dakota and the City of Oacoma, South Dakota, appeal the district court's dismissal of their challenge to the Secretary of the Interior's acquisition of commercial land in trust for the Lower Brule Tribe of Sioux Indians. Concluding that 25

U.S.C. § 465, the statute authorizing acquisition of the land, is an unconstitutional delegation of legislative power, we reverse.

I.

In March 1990, the Tribe submitted an application under 25 U.S.C. § 465, asking the Secretary to acquire ninety-one acres of land in trust for use by the Tribe. The land is located seven miles from the Tribe's reservation and is partially within the City of Oacoma. The Tribe stated that the land would be used to create an industrial park adjacent to an interstate highway, explaining that "[t]his site, Trust status for the land, and tax advantages are critically necessary for the development to occur."

The State of South Dakota and the City of Oacoma protested in writing to the Secretary's Bureau of Indian Affairs ("BIA"). When BIA's Area Director notified the State and the City in March 1991 that the Tribe's application would be approved, they appealed to the Interior Board of Indian Affairs. BIA then disclosed that the Assistant Secretary for Indian Affairs had approved the application in December 1990, without notifying the protestants. The Board dismissed the appeal because it has no jurisdiction to review decisions by the Assistant Secretary. *State of South Dakota & Town of Oacoma v. Aberdeen Area Director, BIA*, 22 I.B.I.A. 126 (1992).

In July 1992, the State and the City filed this action against the Department of the Interior and certain of its officials seeking judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-706. For convenience, we will refer to the defendants collectively as "the Secretary," because he is the Executive Branch official authorized to act under § 465.

We will refer to the State and the City collectively as "plaintiffs."

Plaintiffs allege that they are aggrieved by the Secretary's acquisition because it deprives them of tax revenues and may place the land beyond their regulatory powers. They contend that the acquisition is invalid because § 465 is an unconstitutional delegation of legislative power. Alternatively, they contend (i) that the agency violated its internal rules of procedure and the Assistant Secretary acted beyond the scope of his delegated authority; (ii) that the approval was arbitrary and capricious and not in accordance with the agency's governing regulations, *see* 25 C.F.R. §§ 151.1-14; and (iii) that the Tribe plans to develop the land as a gaming casino and the Secretary was aware of the Tribe's true intentions but failed to comply with the approval procedures of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721.

In November 1992, the Secretary took title to the lands in trust for the Tribe. In January 1994, the Secretary moved to dismiss on the ground that a § 465 acquisition is action "committed to agency discretion by law" and therefore not subject to judicial review. *See* 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821, 828-30, 105 S.Ct. 1649, 1654-55, 84 L.Ed.2d 714 (1985). The district court granted the motion to dismiss, concluding that § 465 is not an unconstitutional delegation of legislative power because the statute identifies the agency to which power is delegated and "clearly delineates the general policy to be applied and the bounds of that delegated authority." Without reaching the "committed to agency discretion" issue, the court also held, *sua sponte*, that it had no jurisdiction to review

plaintiffs' other claims because the Quiet Title Act, 28 U.S.C. § 2409a, which permits the United States to be sued to resolve real property disputes, "does not apply to trust or restricted Indian lands." [1]

II.

On appeal, plaintiffs argue that § 465 provides no legislative standards or boundaries governing the Secretary's acquisitions. The Secretary responds that the statutory purpose of "providing land for Indians" sufficiently defines the general policy and boundaries of the delegated power. The Secretary notes that the Supreme Court has not invalidated a federal statute on delegation grounds since *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542, 55 S.Ct. 837, 848, 79 L.Ed. 1570 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935). Interestingly, the same Congress enacted both the Indian Reorganization Act, of which § 465 was a part, and the statutes invalidated in *Schechter Poultry* and *Panama Refining*. It is appropriate to consider whether § 465 satisfies the nondelegation doctrine as it has evolved since 1935, particularly because no other appellate court has done so.[2]

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[1] The court relied on *State of Florida v. United States Dep't of the Interior*, 768 F.2d 1248 (11th Cir.1985), *cert. denied*, 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986). *Contra*, *City of Sault Ste. Marie v. Andrus*, 458 F.Supp. 465, 470-72 (D.D.C.1978). We doubt whether the Quiet Title Act precludes APA review of agency action by which the United States *acquires* title. But given our conclusion that § 465 is an unconstitutional delegation of power, we need not decide this issue. The court in *Florida* conceded that the Quiet Title Act does not bar claims "that the Secretary acted unconstitutionally or beyond his statutory authority when the United States acquired title to the land." 768 F.2d at 1255 n. 9.

The nondelegation doctrine is easy to state: "Congress may not constitutionally delegate its legislative power to another branch of Government." *Touby v. United States*, 500 U.S. 160, 165, 111 S.Ct. 1752, 1755, 114 L.Ed.2d 219 (1991) (citation omitted). It is difficult to apply. A court must inquire whether Congress "has itself established the standards of legal obligation, thus performing its essential legislative function." *Schechter Poultry*, 295 U.S. at 530, 55 S.Ct. at 843. But the court must be mindful that the doctrine does not prevent Congress from obtaining the assistance of its coordinate Branches. Therefore, so long as Congress "lay[s] down by legislative act an intelligible principle" governing the exercise of delegated power, it has not unlawfully delegated its legislative power. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, 48 S.Ct. 348, 352, 72 L.Ed. 624 (1928), quoted in *Touby*, 500 U.S. at 165, 111 S.Ct. at 1755, and *Mistretta v. United States*, 488 U.S. 361, 372, 109 S.Ct. 647, 655, 102 L.Ed.2d 714 (1989). A delegation is overbroad "[o]nly if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus v. United States*, 321 U.S. 414, 426, 64 S.Ct. 660, 668, 88 L.Ed. 834 (1944).

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[2] To our knowledge, only one other district court has considered the nondelegation question in the sixty-year life of the statute, and its perfunctory analysis is unpersuasive. *See City of Sault Ste. Marie*, 458 F.Supp. at 473.

The Supreme Court has recognized that judicial review is a relevant safeguard in considering delegation issues:

> It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations."

Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 219, 109 S.Ct. 1726, 1731, 104 L.Ed.2d 250 (1989), *quoting American Power & Light Co. v. SEC*, 329 U.S. 90, 105, 67 S.Ct. 133, 142, 91 L.Ed. 103 (1946). Justice Marshall eloquently stated this principle in his concurring opinion in *Touby:* "judicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds." 500 U.S. at 170, 111 S.Ct. at 1758. Thus, when the Secretary argued to the district court that his actions under § 465 may not be judicially reviewed *because the statute commits them entirely to agency discretion*, he implicitly acknowledged that this delegation issue requires a particularly close look. *See United States v. Garfinkel*, 29 F.3d 451, 459 (8th Cir.1994) ("[J]udicial review is a factor weighing in favor of upholding a statute against a nondelegation challenge") (citation omitted).

We begin by examining the very broad language of § 465:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire . . . any interest in lands . . . within or without existing

> reservations . . . for the purpose of providing land for Indians.
>
> * * * * *
>
> Title to any lands or rights acquired . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

By its literal terms, the statute permits the Secretary to purchase a factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe, thereby removing these properties from state and local tax rolls. Indeed, it would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present. There are no perceptible "boundaries," no "intelligible principles," within the four corners of the statutory language that constrain this delegated authority—except that the acquisition must be "for Indians." It delegates unrestricted power to acquire land from private citizens for the private use and benefit of Indian tribes or individual Indians.

The Secretary's power to purchase land under § 465 triggers the complementary power to acquire land by condemnation under 40 U.S.C. § 257. *See United States v. 29 Acres of Land*, 809 F.2d 544, 545 (8th Cir.1987). It is therefore appropriate to consider the delegation question in the context of the federal government's extensive condemnation powers.

The power to acquire land by condemnation for a public purpose is an inherent aspect of sovereignty. *See Kohl v. United States*, 91 U.S. 367, 371-72, 23

L.Ed. 449 (1875). In exercising that power, Congress need not select the particular land to be taken; that function may be delegated to the Executive Branch. *See Chappell v. United States*, 160 U.S. 499, 510, 16 S.Ct. 397, 400, 40 L.Ed. 510 (1896). So long as the condemnation serves a public use, "the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance." *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406, 25 L.Ed. 206 (1878). However, "a claim that a taking is not 'for public use' is open for judicial consideration." *United States ex rel. T.V.A. v. Welch*, 327 U.S. 546, 557, 66 S.Ct. 715, 720, 90 L.Ed. 843 (1946) (Frankfurter, J., concurring).

It is settled that the United States may purchase land by condemnation for an Indian reservation as a public use. *See United States v. McGowan*, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410 (1938); *State of Minnesota v. United States*, 125 F.2d 636, 640 (8th Cir.1942). That same power authorizes Congress to acquire non-reservation lands in trust for a public use that benefits Indians or Indian tribes. But the question under the nondelegation doctrine is, for what public use does § 465 authorize the Secretary to acquire land. By defining no boundaries to the exercise of this power, the statute leaves the Secretary free to acquire for a multitude of purposes, for example, to expand a reservation,[8] to provide

[8] A separate provision of the Indian Reorganization Act specifically authorized the Secretary to acquire lands to form new reservations or to enlarge existing reservations. *See* 25 U.S.C. § 467. In *State of Minnesota, supra*, we upheld a condemnation under a different, far more specific statute after careful judicial review of the Secretary's decision.

farm land for rural Indians, to provide a factory for unemployed urban Indians, to provide a golf course for tribal recreation, or to provide a lake home for a politically faithful tribal officer. These are very different public uses, and the last is, of course, no public use at all.

Despite the government's broad, inherent power to acquire land for public use, the nondelegation doctrine surely requires at a minimum that Congress, not the Executive, articulate and configure the underlying public use that justifies an acquisition. In some cases, the public use underlying each acquisition is obvious, as when Congress authorizes an agency to acquire lands and buildings to house the agency's operations. But when Congress authorizes the Secretary to acquire land in trust "for Indians," it has given the agency no "intelligible principle," no "boundaries" by which the public use underlying a particular acquisition may be defined and judicially reviewed. This legislative vacuum in turn greatly expands the extent of the standardless delegation.

III.

The legislative history of § 465 suggests that Congress did not intend to delegate unrestricted power to acquire land "for Indians." The statute was enacted as section 5 of the Indian Reorganization Act of 1934, 48 Stat. 985. The Report of the Committee on Indian Affairs stated:

> The bill now under consideration definitely puts an end to the allotment system through the operation of which the Indians have parted with 90,000,000 acres of their land in the last 50 years. . . . To make many of the now pauperized,

landless Indians self-supporting, it authorizes a long term program of purchasing land for them.

* * * * *

Section 5 authorizes the Secretary of the Interior to purchase or otherwise acquire land for landless Indians.

The title to land thus acquired will remain in the United States. The Secretary may permit the use and occupancy of this newly acquired land by landless Indians; he may loan them money for improvements and cultivation, but the continued occupancy of this land will depend on its beneficial use by the Indian occupant and his heirs.

H.R.Rep. No. 1804, 73d Cong., 2d Sess. 6-7 (1934). In the House floor debate, Representative Howard, a chief sponsor of the bill, further explained the purpose of section 5:

> Section 5 sets up a land acquisition program to provide land for Indians who have no land or insufficient land, and who can use land beneficially . . . . This program would permit the purchase of land for many bands and groups of landless Indians and would permit progress toward the consolidation of badly checkerboarded Indian reservations, as well as provide additional agricultural land to supplement stock grazing or forestry operations.

78 Cong.Rec. 11730 (June 15, 1934). Representative Howard characterized the acquisition of trust lands to be used for farming as "the keystone of the new Indian policy." 78 Cong.Rec. 11729. Representative

Hastings described the land to be acquired as "Indian subsistence-homesteads." *Id.* at 9269.

This agrarian focus is not surprising in a Congress acting against the backdrop of an industrial sector ravaged by the Great Depression. Yet in drafting § 465, Congress failed to include standards to reflect its limited purpose. Instead, the Secretary was delegated unrestricted power to acquire land "for Indians" in a statute that contained no "boundaries" defining how that power should be exercised. The Secretary has responded by asserting all of the unlimited power conferred by the statute's literal language. First, he promulgated regulations that place no restrictions on the purpose for which land may be placed in trust "for Indians." *See* 25 C.F.R. § 151.10. Second, when his acquisition procedures and decisions were challenged in court, he asserted that his exercise of this power is not subject to judicial review under the APA because it is "committed to agency discretion."

This case illustrates the problems created by the exercise of such unrestricted power. Intending only that the Secretary acquire rural lands suitable for farming, grazing, and logging by Indians, Congress in § 465 addressed only one intergovernmental issue —it made the lands taken in trust exempt from state and local property taxes. But when the Secretary acquires urban land for industrial or commercial uses, other important issues inevitably arise. For example, the South Dakota Attorney General asked the Secretary whether the City of Oacoma's ordinances, including its zoning ordinances, would be enforceable against the property if it was taken in trust. The Secretary's Field Solicitor responded:

> If the parcel is not declared to be part of the reservation, then ordinances which are civil or regulatory in nature and which do not affect the proprietary interest of the United States, acquired by virtue of acquisition of title to the land, *may* apply. *See State of Florida, supra; Mescalero Apache Tribe v. Jones*, [411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973)].

(Emphasis added.) This answer suggests that the BIA will force the State and the City to establish their right to regulate the trust land in court, where BIA will no doubt argue that state and local regulatory powers are preempted. The result is a legislative void. Congress, not the BIA, and indeed not the courts, should define in the first instance the extent to which lands taken in trust for industrial and commercial Indian use are thereby freed from state and local zoning ordinances, building codes, health and safety regulations, and other exercises of the police power.

Had the Secretary acted consistently with § 465's legislative history—by limiting his acquisition authority to purposes such as forming or enlarging reservations, restoring alienated allotment lands, and providing other lands for agrarian uses—we would face the question whether the statute's over-breadth was suitably slimmed by this legislative history and agency interpretation. Normally, delegation questions are considered in light of a statute's legislative history and context, *see Garfinkel*, 29 F.3d at 458, and any narrowing agency interpretations, *see International Union, UAW v. OSHA*, 938 F.2d 1310 (D.C.Cir.1991); 37 F.3d 665 (D.C.Cir.1994) (decision after remand). But in this case, the agency

has interpreted the statute as broadly as possible, consistent with its literal language. We have approved that interpretation in another context and as a panel may not overrule a prior panel opinion. *See Chase v. McMasters*, 573 F.2d 1011, 1015-16 (8th Cir.1978), *cert. denied*, 439 U.S. 965, 99 S.Ct. 453, 58 L.Ed.2d 423 (1978). Moreover, if we now took a more limited view of the statute, the Secretary's regulations would be overbroad, and there would be no basis upon which to uphold this acquisition. Thus, we conclude that we must accept the agency's interpretation and construe the statute literally for purposes of applying the nondelegation doctrine.

IV.

There are additional, procedural aspects of the Secretary's acquisition program that further support our decision. The administrative record reveals that the Tribe purchased the land in question for $80,255.94, three months *after* it filed the § 465 application, and after the BIA's Lower Brule Agency had recommended favorable action on the application. The record does not disclose (i) whether the purchase price was based upon tax free commercial use by the Tribe, and (ii) the price the United States paid when it acquired the land from the Tribe in November 1992. Plaintiffs criticize the administrative record as contrived and inadequate. The Secretary argues that procurement practices of the Tribe and BIA under § 465 are not subject to judicial review.

There are many opportunities for abuse in a program of this nature. For example, a seller who knows that land is being sold for a tax free use will charge more for that land, thereby capturing some of the economic benefit of tax free status that Con-

gress intended for the Indians. Here, if the Tribe paid such a monopoly rent, the congressional purpose has been frustrated. But if the Secretary reimbursed the Tribe for that purchase price, the taxpayers have suffered from agency ignorance or misfeasance. Given the extensive standards that Congress has built into other procurement programs, *see, e.g.*, 10 U.S.C. Ch. 159; 41 U.S.C. §§ 251-260, the total absence of procurement principles and safeguards in § 465 violates the nondelegation doctrine.

V.

Those who drafted § 465 failed to incorporate the limited purpose reflected in the legislative history. Presumably, they either drafted poorly or ignored the delegation issue. The agency that received this inartful delegation then used the absence of statutory controls to claim unrestricted, unreviewable power. The result is an agency fiefdom whose boundaries were never established by Congress, and whose exercise of unrestrained power is free of judicial review. It is hard to imagine a program more at odds with separation of powers principles.

In his concurring opinion in *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 685-86, 100 S.Ct. 2844, 2886, 65 L.Ed.2d 1010 (1980), Justice (now Chief Justice) Rehnquist summarized the functions of the nondelegation doctrine as articulated in prior Supreme Court cases:

> First, and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will.

> Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion. Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated discretion will be able to test that exercise against ascertainable standards.

(Citations omitted.) We conclude that § 465 fails all three of these nondelegation criteria and is invalid. Accordingly, the Secretary had no authority to acquire the lands in question in trust for the Tribe. The judgment of the district court is reversed and the case is remanded for further proceedings consistent with this opinion.

MURPHY, Circuit Judge, dissenting.

The court in this case unnecessarily reaches a constitutional issue and bases its conclusions on speculation rather than the record. Its decision that a portion of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, is an unconstitutional delegation of legislative power is not supported by the statute or its legislative history. The court invalidates today a congressional enactment designed to acquire land in trust for Indians that has been in place for over sixty years and, in the process, places in doubt the status of all Indian trust land. I must therefore dissent.

I.

The primary focus of the appeal taken by the State of South Dakota and the City of Oacoma (plaintiffs) is the district court's dismissal for lack of jurisdiction

of their claims brought under the Administrative Procedure Act (APA), 5 U.S.C. § 701-706. The Department of the Interior and the two individually named defendants (collectively, the Secretary) had argued on their motion to dismiss that judicial review of the APA claims is unavailable because the decision whether to acquire land in trust is committed to agency discretion. Plaintiffs disagreed and also challenged the constitutionality of the statute authorizing land to be taken into trust, § 465 of the Indian Reorganization Act. The district court found the statute to be constitutional and did not reach the issue of the availability of judicial review. Instead it concluded sua sponte that it lacked jurisdiction over the APA claims because the United States has not waived its sovereign immunity for claims relating to Indian trust land.

Rather then addressing the jurisdictional issue, the majority stretches to consider the constitutionality of the underlying statute. A cardinal principle guiding federal courts is that constitutional issues should not be reached unless necessary to a decision. *Jean v. Nelson*, 472 U.S. 846, 854, 105 S.Ct. 2992, 2996-97, 86 L.Ed.2d 664 (1985). This is a "fundamental rule of judicial restraint." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 157, 104 S.Ct. 2267, 2279, 81 L.Ed.2d 113 (1984). The court suggests, but does not decide, that the district court had jurisdiction to consider the claims brought under the APA. If so, the principle of judicial restraint should lead to consideration of those claims prior to reaching any constitutional issue. Resolution of the constitutional question would not be required if the merits of the APA claims were to be determined in favor of the plaintiffs.

Moreover, resolution of the APA inquiry could inform the analysis of the delegation issue since the availability of judicial review of an agency action is relevant in determining whether the authorizing statute is a lawful delegation. *See United States v. Garfinkel*, 29 F.3d 451, 459 (8th Cir.1994). Although the court recognizes this principle, it relies on the Secretary's mere assertion that his decision is unreviewable to support its conclusion that the delegation is unlawful.

II.

Even if the court had reason to address the delegation issue at this time, its decision strays far from the existing path of nondelegation doctrine. Congressional delegations of legislative power are valid "if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73, 109 S.Ct. 647, 655, 102 L.Ed.2d 714 (1989) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105, 67 S.Ct. 133, 142, 91 L.Ed. 103 (1946)). To assess whether a statute imposes sufficient boundaries on the delegated authority, a reviewing court looks at the language of the statute, its purpose and factual background, and the statutory context in which the standards appear. *United States v. Garfinkel*, 29 F.3d 451, 458 (8th Cir.1994) (citing *American Power & Light Co. v. SEC*, 329 U.S. 90, 104, 67 S.Ct. 133, 141-42, 91 L.Ed. 103 (1946)). A statute written in broad terms does not violate the Constitution so long as Congress lays down an "intelligible principle" to guide the agency's discretion. *Touby v. United States*, 500 U.S. 160, 165, 111 S.Ct. 1752, 1755-56, 114 L.Ed.2d 219 (1991); *Garfinkel*, 29 F.3d at 457.

Only twice in its history, and not since 1935, has the Supreme Court invalidated a statute on the ground of excessive delegation of legislative authority. Since 1935, the Supreme Court has consistently upheld statutes involving broad delegations of authority. *See e.g., Mistretta v. United States*, 488 U.S. 361, 372-73, 109 S.Ct. 647, 654-55, 102 L.Ed.2d 714 (1989) (authority to promulgate sentencing guidelines for federal criminal offenses); *Lichter v. United States*, 334 U.S. 742, 785-86, 68 S.Ct. 1294, 1316-17, 92 L.Ed. 1694 (1948) (authority to determine excessive profits); *American Power & Light Co. v. SEC*, 329 U.S. 90, 67 S.Ct. 133, 91 L.Ed. 103 (1946) (authority to prevent unfair or inequitable distribution of voting power among security holders); *Yakus v. United States*, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944) (authority to fix commodity prices that would be fair and equitable and would effectuate purpose of Emergency Price Control Act of 1942); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600, 64 S.Ct. 281, 286-87, 88 L.Ed. 333 (1944) (authority to determine just and reasonable rates); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26, 63 S.Ct. 997, 1013, 87 L.Ed. 1344 (1943) (authority to regulate broadcast licensing for "public interest, convenience, or necessity"). The delegation doctrine has in fact evolved into a tool of statutory construction, by which reviewing courts give "narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *See Mistretta*, 488 U.S. at 373 n. 7, 109 S.Ct. at 655 n. 7.

Although the court notes that the same Congress passed the Indian Reorganization Act and the statutory provisions found unconstitutional in 1935 on

delegation grounds, it does not attend to the striking differences between the statutes. The National Industrial Recovery Act (NIRA), 48 Stat. 195 (1933),[1] contained the unconstitutional provisions struck down in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 531, 55 S.Ct. 837, 843-44, 79 L.Ed. 1570 (1935) (provision authorizing the President to approve codes of fair competition for a trade or industry) and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 406, 55 S.Ct. 241, 242, 79 L.Ed. 446 (1935) (provision granting the President discretion to prohibit interstate and foreign commerce of certain petroleum products). The NIRA represented the Roosevelt administration's response to a national emergency caused by widespread unemployment and economic disruption during the Depression. *See* 48 Stat. 195, Title I, section 1. It granted the President unfettered discretion to approve any law, and impose his own conditions on it, relating to a "vast array of commercial and industrial activities throughout the country." *Schechter*, 295 U.S. at 539, 55 S.Ct. at 847. The Indian Reorganization Act in contrast did not convey such unbridled discretion to another branch, and it is one of a long line of enactments reflecting the special role the federal government has played with respect to Indian tribes. *See* F. Cohen, *Handbook of Federal Indian Law* 68-88 (reprint ed. 1988) (reviewing federal Indian legislation starting from 1789).

The court today departs from precedent like *Mistretta* by invalidating a statute as an unlawful

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[1] This statute was later amended by 49 Stat. 375 (1935), which repealed the provisions relating to codes of fair competition and provided for the expiration of Title I of the Act in 1936.

delegation based on the broadest possible reading of its terms. In the course of its discussion, it focuses on unlikely hypothetical uses of the Secretary's delegated authority and ignores the limiting effect of the context in which the statute was passed.

Prior to 1934, Congress pursued an allotment policy with regard to Indian land. *See id.* at 78-83. Existing Indian tribal land was allotted to individual Indians, and surplus lands were sold to whites. Although the purpose of the policy was to encourage assimilation, it resulted most significantly in the loss of Indian land as individual allotments were sold to non-Indians, lost through tax forfeiture or otherwise alienated. *See Shangreau v. Babbitt*, 68 F.3d 208 (8th Cir.1995). Between 1887 and 1934, Indian land holdings were reduced from 138 million acres to 48 million, a loss of 90 million acres. F. Cohen, *Handbook of Federal Indian Law* 138 (1982 ed.).

Discontent with the allotment policy caused Congress to enact the Indian Reorganization Act of 1934, 25 U.S.C. § 461-479, to stem the loss of Indian lands and to assist Indians in acquiring land adequate for self-support. *See Chase v. McMasters*, 573 F.2d 1011, 1016 (8th Cir.), *cert. denied*, 439 U.S. 965, 99 S.Ct. 453, 58 L.Ed.2d 423 (1978). The purpose of the Act was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 93 S.Ct. 1267, 1272, 36 L.Ed.2d 114 (1973) (quoting H.R.Rep. No. 1804, 73d Cong.2d Sess., 1 (1934)). The Act rejected assimilation as a goal and instead sought Indian self-determination. The portion of the Act under attack here, 25 U.S.C. § 465, specifically

addresses the problem of the loss of Indian land and authorizes the Secretary to acquire land in trust "for the purpose of providing land for Indians."

The text of the Act gives the Secretary broad discretion to acquire land in trust, but it also limits that discretion explicitly. It directs that any land acquired must be for Indians as they are defined in 25 U.S.C. § 479. It authorizes the appropriation of a limited amount of funds with which land could be acquired and specifically prohibits use of such funds to acquire land for the Navajo Indians outside of their established reservation boundaries in Arizona and New Mexico.

The court's conclusion that the statutory language does not give the Secretary adequate direction ignores the Act's historical context. Although § 465 uses broad language, its direction that land be acquired "for the purpose of providing land for Indians," has specific meaning in light of the failure of the allotment policy and Congressional rejection of assimilation as a goal. It instructs the Secretary that land should be acquired to replace the millions of acres of Indian land lost as a result of the allotment policy and placed in trust to prevent its alienation. This interpretation is reinforced by related provisions in the Act which specifically prohibit features of the allotment system. Such provisions, for example, prohibit allotment of reservation land to individual Indians, 25 U.S.C. § 461, extend existing periods of trust and restrictions on alienation on any Indian lands, 25 U.S.C. § 462, authorize restoration of surplus lands to tribal ownership, 25 U.S.C. § 463, and prohibit the transfer of restricted Indian lands except to Indian tribes. 25 U.S.C. § 464.

The Secretary's authority is also limited by the guidance provided in the legislative history of the Indian Reorganization Act. *See Mistretta*, 488 U.S. at 376 n. 10, 109 S.Ct. at 657 n. 10. That history explains that § 465 was enacted in response to the loss of 90 million acres that resulted from the operation of the allotment system, H.R.Rep. No. 1804, 73d Cong.2d Sess., 6 (1934), and identifies goals of "rehabilitat[ing] the Indian's economic life" and "develop[ing] the initiative destroyed by . . . oppression and paternalism." *Mescalero*, 411 U.S. at 152, 93 S.Ct. at 1272. Its various provisions were designed to encourage tribal enterprise and enable Indians "to enter the white world on a footing of equal competition." *Id.* at 157, 93 S.Ct. at 1275, citing 78 Cong. Rec. 11732. The legislative history also directs that after land is acquired in trust, the Secretary must assure continued "beneficial use by the Indian occupant and his heirs." H.R.Rep. No. 1804 at 7. *See also City of Tacoma v. Andrus*, 457 F.Supp. 342 (D.D.C.1978).

The availability of judicial review of the Secretary's actions may also serve to limit the delegation here. *See Garfinkel*, 29 F.3d at 459. Judicial review "is a factor weighing in favor of upholding a statute against a nondelegation challenge." *Id.* The majority focuses on the Secretary's claim that such review is not available under the APA in this case, but does not consider the issue, which has not yet been developed in the trial court.

The majority chooses to disregard the limits on the Secretary's authority and the principles that guide the exercise of his discretion. It claims that it cannot consider narrowing constructions because it is bound by the holding in *Chase v. McMasters*, 573

F.2d at 1015-16. *Chase* did not hold that § 465 grants the Secretary unlimited authority to acquire land, however, but merely rejected the suggestion that the authority is limited to acquiring land for landless Indians and concluded that § 465 authorized the Secretary to accept conveyance of title to land already owned in fee by an Indian.

Although the court recognizes that it is bound by the holding in *Chase*, it rejects the interpretation there of the legislative history of § 465 when it claims that Congress meant only to provide agrarian land for landless Indians. It states its own view that Congress only intended "that the Secretary acquire rural lands suitable for farming, grazing, and logging by Indians." Not only is this interpretation of the legislative history contrary to *Chase*, but the majority's approach turns the nondelegation doctrine on its head. Instead of using the legislative history to inform its reading of the statute, the court uses it in an attempt to establish a line beyond which authority could not lawfully be delegated. The relevant question for the nondelegation doctrine, however, is whether the statute contains sufficient standards to meet the constitutional requirement of specificity.

Plaintiffs' allegations raise state and local concerns related to taxation and regulation of land and possible gambling operations. These concerns appear to have influenced the majority, but they are not directly relevant to the constitutional analysis. Whether federal policy should support the taking of land into trust for Indian tribes is up to the other branches of government, not the judiciary.

In its discussion the court does not limit itself to the specific land acquisition at issue in this case, but instead hypothesizes that the Secretary, as head

of an "agency fiefdom," may "purchase the Empire State Building in trust for a tribal chieftain as a wedding present" or "provide a lake home for a politically faithful tribal officer." This is pure speculation. Whether such transactions would be permissible under the statute are not questions raised by this case, and the Secretary's regulations make it unlikely that such scenarios could arise.[2]

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[2] Contrary to the court's assertion that the Secretary has asserted "unlimited power," the regulations reflect the Congressional concern that the land be acquired for the benefit of Indians. 25 C.F.R. § 151.1-151.15. The Department's land acquisition policy for tribes and for individual Indians is stated in 25 C.F.R. § 151.3:

> (a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status
>
> 1) when the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or,
>
> 2) when the tribe already owns an interest in the land[;] or,
>
> 3) when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.
>
> (b) Subject to the provisions contained in the acts of Congress which authorize land acquisitions or holding land in trust or restricted status, land may be acquired for an individual Indian in trust status
>
> 1) when the land is located within the exterior boundaries of an Indian Reservation, or adjacent thereto; or,
>
> 2) when the land is already in trust or restricted status.

The regulations also list specific factors to be considered when evaluating a request. These include the need for the individual Indian or the tribe for additional land, the purposes

The record indicates that the land at issue here was part of the Tribe's original reservation, but was later lost. The land was purchased by the Tribe after it had been zoned for industrial purposes, and the Tribe stated that it intended to develop an industrial park on it. Any attempt to develop a gambling casino on trust land would be subject to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, which requires both consideration by the Secretary of various factors and approval by the governor of the State. 25 U.S.C. § 2719(b)(1).[3] The hypothetical "opportunities for abuse" the majority fears are not based on the record here and do not provide a sufficient basis to strike down an act of Congress.

For all the reasons stated, the court is wrong in finding § 465 of the Indian Reorganization Act of 1934 an unconstitutional delegation of legislative authority. The district court should not be reversed on

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for which the land will be used, the impact on the state and its political subdivisions resulting from the removal of the land from the tax rolls, and jurisdictional problems and potential conflicts of land use which may arise. 25 C.F.R. § 151.10 (April 1995).

The Secretary promulgated new regulations on June 23, 1995 which require that state and local governments which are affected by a proposed acquisition be notified and given time to respond. 25 C.F.R. §§ 151.10, 151.11 (60 F.R. 32879, June 23, 1995). Although the old regulations do not set out such a notice requirement, it was apparently done in practice. The State and city in this case both were notified and responded. The 1995 regulations also provide several additional factors to consider for off-reservation land acquisitions.

[3] This statute also provides that nothing in the section limiting gaming on trust land "shall affect or diminish the authority and responsibility of the Secretary to take land into trust." 25 U.S.C. § 2719(c).

this basis. The Act was intended "to rehabilitate the Indian's economic life" and "to develop the initiative destroyed by a century of oppression and paternalism," *Mescalero*, 411 U.S. at 152, 93 S.Ct. at 1272, and the Congressional delegation of authority for that purpose is principled and proper.

III.

The nonconstitutional issues on the appeal need to be addressed, and one of these requires reversal. Plaintiffs claim under the APA that the Department failed to follow its own procedures when it reviewed and approved the Tribe's request to take land into trust,[4] that the Assistant Secretary acted beyond the scope of his delegated authority, and that the decision to take the land into trust was arbitrary, capricious and an abuse of discretion. The district court relied on the analysis in *State of Florida v. United States Department of the Interior*, 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986), to conclude that the Quiet Title Act (QTA), 28 U.S.C. § 2409a, precludes review in this case and that it therefore lacked jurisdiction. The QTA permits the United States to be sued to resolve real property disputes, but by its terms it does not apply to trust or restricted Indian lands. 28 U.S.C. § 2409a. For the reasons discussed below, I would reverse and remand for further proceedings.

[4] Plaintiffs assert that the Assistant Secretary for Indian Affairs failed to consider on the record the factors listed in 25 C.F.R. § 151.10. Specifically, they claim that the Assistant Secretary did not know the actual purposes for which the land would be used, did not explain the need of the Tribe for additional land, and did not consider the jurisdictional problems and potential conflicts of land use which might arise, or the effect of the removal of the land from the tax rolls. They also assert that the Assistant Secretary did not consider whether the acquisition was consistent with 25 C.F.R. § 151.3, which describes when land outside the reservation may be acquired, and did not follow procedures described in memoranda issued by the Secretary of the Interior.

The APA waives the sovereign immunity of the United States and federal officers for challenges to an agency action in which the relief sought is not money damages. 5 U.S.C. § 702. The broad waiver of immunity contains an exception, however:

> Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Id. The QTA, 28 U.S.C. § 2409a, is one such "other statute that grants consent to suit" referred to in the APA waiver provision. *Block v. North Dakota ex rel. Board of University and School Lands*, 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983). The QTA provides that:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights.

28 U.S.C. § 2409a. It also provides that this section permitting suits against the United States "does not apply to trust or restricted Indian lands. . . ." *Id.*

The QTA is the exclusive means by which an adverse claimant can assert a property interest against the United States. *Block*, 461 U.S. at 286, 103 S.Ct. at 1819; *Ducheneaux v. Secretary of the Interior*, 837 F.2d 340, 343 (8th Cir.), *cert. denied*, 486 U.S.

1055, 108 S.Ct. 2822, 100 L.Ed.2d 923 (1988). If such a claim is barred by the provisions of the QTA because it involves title to Indian trust lands or the statute of limitations has run, for example, it cannot be brought under another statute. *Block*, 461 U.S. at 286, 103 S.Ct. at 1819; *Ducheneaux*, 837 F.2d at 343 (application of the QTA "preempts" review under the APA). The waiver of immunity in the APA does not apply to such claims. *Id.*

The key point here is these plaintiffs do not assert a property interest in the land. Instead they seek judicial review of the agency action by which land was acquired. The QTA would not provide consent to suit for such a claim, even if Indian trust lands were not involved. The question then is to what extent the QTA provisions limit the scope of the waiver of immunity in the APA for claims to which the QTA itself does not apply.

It would distort the meaning of the QTA to interpret it as impliedly forbidding all suits seeking to divest the United States of title to Indian trust land, including those in which judicial review of the agency decision to acquire trust lands is invoked. The QTA was enacted to allow adverse claimants to assert their interests in real property by suing the United States. Its provisions set out the requirements for a valid complaint of this type. The exception for Indian lands was included to avoid the possibility that such suits be used to "abridg[e] the historic relationship between the Federal Government and the Indians without the consent of the Indians." H.R.Rep. No. 1559, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 4547, 4556-57. The statutory language simply states that the section does not apply to such lands. To say that Congress intended by this to foreclose any type of claim which could result in divestment of title to Indian trust land would require an excessively broad reading of the statute's language and its purpose.

State of Florida v. United States Department of the Interior, relied on by the district court, held that a suit challenging the United State's title to Indian trust land was impliedly forbidden by the QTA, even though it was not technically a suit to quiet title. 768 F.2d at 1253-55. That conclusion was based on a finding there that the suit challenged the tribe's conduct on the land, rather than the Secretary's decision to acquire the land, and thus did not seek review of an agency action. *Id.* at 1251. The *Florida* plaintiffs did not intervene during the trust application process, but complained only after the tribe began selling cigarettes and operating a bingo facility on the land.

In contrast, plaintiffs here seek review of an agency action. They actively opposed the land being taken into trust throughout the Department's review of the Tribe's application, and their claims specifically challenge the decision to acquire the land and the process by which that decision was made. This case more closely resembles *City of Sault Ste. Marie v. Andrus*, 458 F.Supp. 465, 470-72 (D.D.C.1978), which held that the QTA did not preclude claims challenging the Department's decision to take land into trust.[6]

The nature of the relief sought in a challenge to existing title differs from that sought in a request for review of an administrative decision to acquire title. This is true even though both could result in divest-

[6] Plaintiffs in *Sault St. Marie* claimed that the tribe for which land was taken into trust was not a tribe within the meaning of the Indian Reorganization Act.

ment of title to Indian trust land. The *Florida* decision rests on the fact that the complaints in that case arose only after the land was taken into trust. In such circumstances divestment could interfere with an existing trust relationship. Although the plaintiffs in this case similarly ask that the trust acquisition be set aside,* the complaint seeks review of decisions made before the trust relationship was established. Challenging the acquisition of title is less intrusive to a trust relationship than challenging the status of existing title.

In sum, the QTA does not prevent these plaintiffs from bringing an APA claim to challenge the Secretary's decision to take title to the land in trust for the Tribe, and the district court's dismissal of these claims should be reversed. In its motion for dismissal, the Department also raised the issue regarding the availability of judicial review which was not considered below. That issue should be resolved by the district court on remand.

For these reasons, I would reverse the judgment of dismissal and remand for further proceedings consistent with this opinion.

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* The timing of the actual taking of the land into trust does not affect the analysis in this case. The final decision to take the land was made on December 13, 1990, but because of problems with the title, the actual acquisition did not occur until November 30, 1992. When this action was filed on July 13, 1992, it technically did not seek to divest the United States of title, but to prevent it from completing the acquisition. If the QTA were interpreted to preclude all claims to divest after acquisition, jurisdiction could have been lost on November 30, or possibly earlier. Because the QTA does not affect claims seeking the type of judicial review sought here, however, the date of the acquisition does not appear to be of critical importance.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

Civ. 92-3023

STATE OF SOUTH DAKOTA and CITY OF OACOMA,
PLAINTIFFS

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR;
EDDIE BROWN, Assistant Secretary-Indian Affairs;
and JERRY JAEGER, Acting Area Director,
Bureau of Indian Affairs,
DEFENDANTS

[Filed April 1, 1994]

MEMORANDUM OPINION

PROCEDURAL HISTORY

Plaintiffs the state of South Dakota and the city of Oacoma (plaintiffs) brought this action seeking judicial review of an administrative decision of the Department of the Interior (DOI), an agency of the United States. Plaintiffs also seek a declaration that the statute under which the DOI acted is unconstitutional. Pending are a motion to dismiss by defendants, a motion for summary judgment by plaintiffs, and several other motions tangential to these dispositive motions.

FACTS

A. March 30, 1990, Application of the Lower Brule Sioux Tribe

On March 30, 1990, the Tribal Chairman for the Lower Brule Sioux Tribe, a federally-recognized Indian tribe, sent a letter to the Bureau of Indian Affairs (BIA) asking that a parcel of land adjacent to and lying partially within the town of Oacoma, South Dakota, be taken into trust for the benefit of the tribe.[1] *See* Exhibit to Attachment 17 of the Administrative Record (A.R. 17). The BIA is a subdivision of the DOI. The land, consisting of approximately 91 acres, lies seven miles south of the southernmost boundaries of the Lower Brule Sioux Reservation and adjacent to and partially within the city of Oacoma. On March 30, 1990, the BIA sent a letter to the Governor of South Dakota and the Mayor of Oacoma requesting comments on the proposed trust acquisition on the subjects of taxes, governmental services provided to the property, and zoning. A.R. 22, Exhibit 8.

B. April 26, 1990, Response of the State of South Dakota

On April 26, 1990, the state of South Dakota responded to the BIA's March 30 inquiry. A.R. 22, Exhibit 15. The state believed the BIA had provided insufficient information about the project to enable

[1] Although the tribe's request was officially made on March 30, 1990, apparently the tribe's intentions were known in advance of the March 30 letter. The administrative record reveals that as early as February 28, 1990, letters in resistance to the proposal were sent to the BIA. *See* A.R. 1-5, 22, Exhibit 6.

the state to respond intelligently. *Id.* Specifically, the state contended that it should be told the purpose for which the tribe intended to use the proposed trust lands. *Id.* Without this information, the state argued that it could not determine whether the proposal was suitable under 25 C.F.R. §§ 151.3(a)(3) and 151.10. *Id.* Furthermore, although the state was able to determine what the current taxes on the undeveloped property were, the state could not determine what the taxes would be once the property was developed because that issue depended on what improvements were made. *Id.* Likewise, the state could not venture an opinion as to how zoning laws would be affected without knowing the purpose for which the land would be used. *Id.*

The state also mentioned that "some" had suggested that the tribe would use the land to build a gambling casino. A.R. 22, Exhibit 15. On this subject, the state informed the BIA that the governor of South Dakota was not prepared to say whether the state would allow gaming pursuant to 25 U.S.C. § 2719(b). *Id.* Rather, the state suggested that the tribe negotiate with the state for a gaming compact *prior to* the DOI's decision whether to take the land into trust. *Id.*

The final major issue raised by the state concerned criminal and civil jurisdictional problems which would arise if the land were taken into trust. A.R. 22, Exhibit 15. The state contended that the nearest tribal law enforcement officer was twenty-five miles away from the proposed trust land and that it would cause unnecessary criminal jurisdiction problems if law enforcement on the proposed parcel were to be handled by tribal police. *Id.* This concern was especially exigent, in the state's opinion, because part of

the land was within the town of Oacoma. *Id.* The state also expressed concern over civil jurisdiction and stated that such things as the routine enforcement of contracts would become unnecessarily difficult. *Id.*

C. April 26, 1990, Response of the City of Oacoma

On April 26, 1990, the City of Oacoma responded to the March 30 letter from the BIA. A.R. 22, Exhibit 16. Oacoma, like the state, contended that it had been provided too little information about the tribe's application to make an intelligent response. *Id.* Oacoma specifically decried the lack of information on the purpose for which the tribe intended to use the land and the reason why the tribe believed trust status was necessary to accomplish this purpose. *Id.*

However, based on the limited information conveyed to Oacoma, Oacoma gave the following responses. The taxes currently collected on the property were $326.88, although this figure would be higher if the land was developed. *Id.* The town of Oacoma currently provided law enforcement and fire protection services to the property. *Id.* The land which was within the city limits was zoned for commercial use. *Id.* In addition, Oacoma, like the state, expressed a great deal of concern over criminal and civil jurisdictional problems which the town believed would arise if the property were to be placed in trust. *Id.* Finally, Oacoma asked for time to submit a supplemental response to the agency after the BIA provided the town with a copy of the tribe's application.[2] *Id.*

[2] Oacoma had made several Freedom of Information Act requests to the BIA and DOI for copies of the tribe's application to take the property into trust, but the agency had not complied. In fact, the BIA told Oacoma that Oacoma would have to request the application from the tribe and that it would be the tribe's decision whether to share a copy of the application with Oacoma. A.R. 22, Exhibit 14.

D. May 15, 1990, Opinion from the Office of the Solicitor

The Office of the Solicitor issued a letter on May 15, 1990, to the BIA Aberdeen Area Director attempting to answer the following questions originally raised by Oacoma. A.R. 13. The letter was forwarded from the Aberdeen Area Director to the BIA Superintendent for the Lower Brule Agency on May 22, 1990.

1. If trust status were granted, would the property be considered "Indian country" for purposes of civil and criminal jurisdiction?

The opinion stated that the answer to this question depended on whether the DOI proclaimed the property to be added to the Lower Brule's existing reservation. *Id.* If so, the property would clearly become "Indian country" for jurisdictional purposes. *Id.*

If the property was merely taken into trust without being added to the reservation, state civil regulations which apply under other circumstances to the United States would also apply to the activities of others on the property. A.R. 13. As to criminal regulations, the opinion stated that state criminal laws would apply if the parcel did *not* qualify as a dependent Indian community. *Id.* If the parcel constituted a dependent Indian community, then tribal and federal criminal laws would apply. *Id.* The

letter enclosed a 1982 opinion from the Office of the Solicitor on what constitutes a "dependent Indian community." *Id.*

2. If the answer to Question 1 is "yes," would Oacoma's ordinances, including zoning ordinances, be enforceable?

The opinion stated that if the property were also added to the reservation, no Oacoma ordinance would apply. A.R. 13. If the property were taken into trust but not added to the reservation, Oacoma's criminal ordinances would apply if the property were *not* a dependent Indian community. *Id.* If the property were taken into trust but not added to the reservation, Oacoma's civil ordinances which do not affect the proprietary interest of the United States *may* apply. *Id.* Oacoma could not collect real property taxes under any scenario and could only collect sales taxes if the property were not added to the reservation. *Id.* Oacoma could regulate the sale of alcoholic beverages only if the land were not added to the reservation and was not a dependent Indian community. *Id.* State law governing gambling would apply if the land were not added to the reservation and were not Indian country, but the federal Indian Gaming Regulatory Act would otherwise apply. *Id.*

3. Assuming that land placed in trust status is Indian country for jurisdictional purposes, can the Lower Brule Sioux Tribe consent to state jurisdiction?

The opinion stated that the tribe *could* consent to state jurisdiction and outlined the procedure for obtaining such consent. A.R. 13.

4. Does the Town of Oacoma have any right to notice and hearing prior to the placement of land in trust?

The opinion answered this question in the negative, stating that 25 U.S.C. § 465 places the decision solely in the Secretary of the Interior's discretion with no requirement of notice and hearing. A.R. 13. However, the opinion also noted that DOI regulations provided a thirty-day comment period for appropriate local governmental units. A.R. 13.

E. May 17, 1990, Memorandum from Lower Brule Agency Superintendent to Aberdeen Area Director

On May 17, 1990, the BIA Superintendent for the Lower Brule Agency sent a memorandum to the BIA Area Director for the Aberdeen area. A.R. 15. The memorandum alleged that the Superintendent had reviewed the tribe's request and "evaluated the responses by the various governmental entities" and "the solicitor's response to Oacoma questions." *Id.* The memorandum discussed factors set forth in 25 C.F.R. § 151.10 and concluded that the federal government should take the land into trust for the benefit of the tribe. *Id.* Although the Superintendent acknowledged in the memorandum that the state and Oacoma had expressed concerns over jurisdictional problems, the memorandum did not discuss what these concerns were and merely concluded that the concerns were "overstated." *Id.* The complete packet concerning the proposed trust acquisition was transferred from the BIA Superintendent to the Aberdeen Area Director on May 25, 1990. A.R. 17.

F. June 1, 1990, Supplemental Response of the City of Oacoma

After having been provided a copy of the Lower Brule Sioux Tribe's request for land to be taken into trust, the city of Oacoma submitted a supplemental response to the DOI regarding that request. A.R. 22, Exhibit 22. The application revealed that the purpose for which the tribe intended to use the land was to pursue economic development through the creation of an industrial park which would include preferential employment opportunities for Native Americans. *Id.* Based on this purpose, Oacoma objected to the federal government's taking of the land into trust for the tribe. *Id.*

Specifically, Oacoma objected that the tribe had not shown that the property's trust status was essential for the proposed tribal development. A.R. 22, Exhibit 22. Oacoma argued that trust status was not essential because the tribe had an alternate site for the project on the tribe's reservation (and thus already in trust), where the program could be carried out equally successfully. *Id.* Oacoma also objected to the tribe's request on the grounds that Oacoma would be unduly burdened if it had to provide additional municipal services to the developed property without being able to assess taxes on the property to defray the costs of these additional services. *Id.*

G. June 29, 1990, Rebuttal from the Tribe

On June 29, 1990, the Lower Brule Sioux Tribe sent a letter to the BIA commenting on the responses which the state and Oacoma had sent to the BIA. A.R. 22, Exhibit 25. The tribe stated that, although it had for fifteen years maintained an industrial park

within the reservation boundaries, the park had not flourished because of "the stigma associated with Reservations, distance from the interstate highway," and lack of a servicing airport. *Id.* The tribe asserted that since it had purchased the land adjacent to Oacoma, several manufacturing firms had indicated interest in operating on the site. *Id.* The tribe was of the opinion that the advantages of the land being in trust (i.e., no property taxes), as well as the site's proximity to Interstate 90 and the presence of a nearby airport were necessary ingredients in attracting the attention of the industries that expressed interest in the proposed park. *Id.* The tribe also asserted that trust status was necessary because the tribe was unsophisticated and would not be able to command fair treatment in the "whiteman's [sic] world" without the federal government's assistance and protection. *Id.*

The tribe also contended that Oacoma did not currently provide any governmental services to the proposed trust property. A.R. 22, Exhibit 25. Specifically, the tribe stated that Oacoma did not provide snow removal, fire protection, solid waste removal, or water and sewage service. *Id.* The tribe stated that any businesses which located at the site would have to pay for these services themselves. *Id.*

On the issue of criminal jurisdiction, the tribe pointed out that Oacoma does not have its own police force but rather contracts for law enforcement services with the Lyman County Sheriff's Office. A.R. 22, Exhibit 25. The tribe stated that the sheriff's office has only one deputy on duty at a time and that the deputy must cover the entire county which is 48 miles by 52 miles. *Id.* Therefore, the tribe argued that response time from tribal police, located only

seven miles from the proposed site, would probably be faster than the response time currently provided by the Lyman County Sheriff's Office. *Id.* The tribe also stated in its letter that a public meeting had been held with the "members of the Oacoma Board of Directors." *Id.*

H. Subsequent Actions

On August 10, 1990, the BIA Acting Area Director forwarded the documentation relative to the proposed trust acquisition to the office of the Assistant Secretary—Indian Affairs of the DOI. A.R. 19. The cover memorandum contained a brief outline of the documents being forwarded, but no real discussion of the elements of 25 C.F.R. § 151.10. *Id.* The BIA Acting Area Director requested approval of the tribe's request for trust status. *Id.*

On December 13, 1990, the Acting Assistant Secretary—Indian Affairs of the DOI issued a memorandum to the BIA Aberdeen Area Director approving the acceptance of the property into trust for the tribe. A.R. 28. The memorandum contained no discussion of the factors found in 25 C.F.R. § 151.10, but merely stated the conclusion that the acquisition was consistent with applicable guidelines and would be in the best interests of the tribe. *Id.*

On November 30, 1992, the land in question was transferred to the United States of America in trust for the Lower Brule Sioux Tribe.

DISCUSSION

A. Subject Matter Jurisdiction

Section 5 of the Indian Reorganization Act, as amended, provides in pertinent part as follows:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> * * *
>
> Title to any lands or rights acquired pursuant to sections . . . 465 . . . of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465. The immediate question posed by plaintiffs' complaint is whether a decision of the Secretary of the Interior (Secretary) under 25 U.S.C. § 465 is subject to judicial review.

Defendants urge in their motion to dismiss that decisions of the Secretary under section 465 are not subject to judicial review because such decisions are wholly committed to the Secretary's discretion. The Administrative Procedure Act (APA) provides for judicial review of federal agency action where only non-monetary relief is requested so long as the agency decision in question is not "committed to agency discretion by law." *See* 5 U.S.C. §§ 701(a)(2), 702. However, the Court raises *sua sponte* another issue related directly to this Court's subject matter jurisdiction.

It is axiomatic that the United States' sovereign immunity protects it from lawsuits except where the federal government has expressly waived that immunity. Furthermore, waivers of sovereign immunity are strictly construed against the party seeking to sue the sovereign. At least one court has found, based on an analysis of the Quiet Title Act (QTA), 28 U.S.C. § 2409a, that the United States did not intend to waive its sovereign immunity as to actions like the one brought herein by the state of South Dakota and the city of Oacoma. *See Florida Dep't of Business Regulation v. United States Department of the Interior*, 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011, 106 S. Ct. 1186, 89 L. Ed. 2d 302 (1986).

In *Florida Department of Business Regulation*, the Eleventh Circuit was asked to review a decision of the Secretary pursuant to section 465 in which land outside a reservation was taken into trust for the Seminole Indian Tribe. *Id.* at 1250. The plaintiffs were political subdivisions of the state of Florida who challenged the Secretary's decision, but did not themselves claim any property interest in the land at issue. *Id.* at 1250, 1254.

The Eleventh Circuit noted that the APA waives sovereign immunity for review of administrative action only to the extent that another statute does not expressly or impliedly forbid suit. *Id.* at 1253. The court observed that the QTA provided the exclusive means by which the United States' title to land could be challenged. *Id.* at 1254 (citing *Block v. North Dakota ex rel Bd. of University & School Lands*, 461 U.S. 273, ——, 103 S. Ct. 1811, 1819, 75 L. Ed. 2d 840 (1983)). The court further noted that the QTA

expressly prohibited challenges to the United States' title to Indian trust lands. *Id.* at 1253-54.

The Eleventh Circuit recognized that, in the usual action to quiet title under the QTA, the plaintiffs assert an adverse property interest in the land while in this case, the state of Florida was not asserting any property interest in the trust land. *Id.* at 1254. However, the court stated that Congress's intent in excluding actions involving Indian trust lands from the QTA was to prevent third parties from interfering with the United States' trust relationship with Indians. *Id.* The lawsuit brought by Florida, if allowed to proceed, would disrupt the trust relationship between the United States and Indians to the same extent as if Florida were asserting a property interest in the trust land. *Id.* Therefore, the court concluded that to prevent circumvention of congressional intent behind the QTA, the court must not exercise jurisdiction to review decisions of the Secretary made pursuant to 25 U.S.C. § 465. *Id.*

The holding of *Florida Department of Business Regulation* dictates that this Court not review the Secretary's decision in this case. In this case, as in the Eleventh Circuit case, the plaintiffs are not asserting an adverse property interest in the trust land, but if allowed to proceed, the plaintiffs' suit would disrupt the United States' trust relationship with Indians, specifically with the Lower Brule Sioux Tribe. Were *Florida Department of Business Regulation* clearly the uniform federal law, the Court's discussion would end here. However, there is at least one other federal court which appears to be in conflict with the Eleventh Circuit.

In *Sault Saint Marie v. Andrus*, 458 F. Supp. 465, 467 (D.D.C. 1978), the district court was asked to

review a decision of the Secretary made pursuant to section 465 taking land outside a reservation into trust for an Indian tribe. The defendants argued that the United States was an indispensable party and that under the QTA, 28 U.S.C. § 2409a, the United States had not waived its sovereign immunity from suit. *Id.* at 469.

The district court recognized that the APA waives sovereign immunity to allow review of administrative action only if another statute does not expressly or impliedly forbid the lawsuit. *Id.* at 470. Unlike the Eleventh Circuit, however, the district court in *Andrus* concluded that the QTA did not impliedly forbid actions seeking judicial review of the Secretary's decisions under section 465. *Id.* at 471-72. The district court concluded that the QTA was enacted for very limited reasons and that Congress did not intend for the QTA to have application outside the narrow confines of that act. *Id.* Because the plaintiffs in *Andrus* were not asserting an adverse property interest in the land in question, their lawsuit did not fall within the parameters of the QTA. *Id.* Accordingly, the district court concluded that the QTA did not act to impliedly forbid plaintiffs' suit for judicial review of the Secretary's decision under section 465. *Id.*

Whether the Eighth Circuit would adopt the Eleventh Circuit's or the *Andrus* court's interpretation of the APA and QTA is somewhat unclear. In *Ducheneaux v. Secretary of the Interior*, 837 F.2d 340, 341 (8th Cir.), *cert. denied*, 486 U.S. 1055, 108 S. Ct. 2823, 100 L. Ed. 2d 923 (1988), a non-Indian woman brought a suit seeking judicial review of the Secretary's decision that she was not entitled to half of her late Indian husband's trust lands. The Eighth

Circuit held that the QTA prohibited federal courts from assuming jurisdiction over the suit because it was a lawsuit which challenged the United States' title to land held in trust for an Indian. *Id.* at 342-44. The *Ducheneaux* court quoted at length and approvingly from the Eleventh Circuit's decision in *Florida Department of Business Regulation*. *Id.* at 343. However, *Ducheneaux* is not completely dispositive of the issue now facing this Court because the plaintiff in *Ducheneaux* was asserting an adverse property interest in the land held by the United States. *Id.* at 341. Thus, *Ducheneaux* fell squarely within the provisions of the QTA while the plaintiffs' claims in this case do not.

In *Chase v. McMasters*, 573 F.2d 1011, 1015-16 (8th Cir. 1978), the facts were much more analogous to this case in that defendants therein (the parties challenging the Secretary's decision), were not asserting a property interest in the land that had been taken into trust. Although the *Chase* court did not discuss the issue of the court's jurisdiction under the APA and QTA, the court nevertheless exercised its jurisdiction to decide the issue of whether the Secretary had abused its discretion in taking certain land into trust pursuant to section 465. *Id.*

Neither *Chase* nor *Ducheneaux* directly determine the issue of whether the QTA impliedly forbids suits under the APA when plaintiffs, who do *not* claim a property interest in land, seek review of a decision of the Secretary to take land into trust for Indians pursuant to 25 U.S.C. § 465. The Court finds the Eleventh Circuit's rationale in *Florida Department of Business Regulation* more persuasive than that expressed by the district court in *Andrus*. Furthermore, the *Ducheneaux* court's discussion of *Florida*

Department of Business Regulation convinces this Court that the Eighth Circuit finds that rationale persuasive also. Accordingly, the Court finds that it has no jurisdiction to review the Secretary's decision and plaintiffs' complaint must be dismissed.

B. Constitutional Claims

Review of the Secretary's decision under the APA would have involved an inquiry into whether the Secretary's decision was arbitrary and capricious and whether the Secretary abided by its own regulations. These areas of inquiry are barred by the QTA, as discussed above. However, plaintiffs also challenge the very constitutionality of 25 U.S.C. § 465. This issue presents a federal question over which this Court can and will assert jurisdiction. *See* 28 U.S.C. § 1331.

Plaintiffs challenge the constitutionality of section 465 both facially and as applied to the trust acquisition in this case. Plaintiffs' first argument concerning the facial validity of the statute is that "[a]ny taking of land into trust off the reservation is beyond the power of Congress." Plaintiff's Amended Complaint, Cause of Action ¶ IV. However, Congress's power over Indians and Indian tribes is plenary and certainly entails the power to take land into trust on behalf of Indian tribes, even when that land lies outside the exterior boundaries of a particular tribe's reservation. U.S. Const. art. I, § 8, cl. 3; and *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599-600 (1906) (stating that Congress has plenary power over Indians). *See also New York v. United States*, —— U.S. ——, 112 S. Ct. 2408, 2417, 120 L. Ed. 2d 120 (1992) (stating

that if the Constitution confers on Congress authority over a certain subject, then "the Tenth Amendment expressly disclaims any reservation of that power to the States"); *Ashton v. Cameron County Water Improvement Dist. No. 1*, 298 U.S. 513, 528, 56 S. Ct. 892, 895, 80 L. Ed. 1309 (1936) (stating that, although states have the power to tax and borrow, the federal government may control or interfere with this power if the right to do so is conferred by the Constitution).

Plaintiffs' next argument presents an as-applied challenge to the statute. Plaintiffs assert that the taking of land into trust in this case was not supported by a rational purpose and, therefore, violates the tenth amendment to the United States Constitution. Plaintiffs' Amended Complaint, Cause of Action ¶ IV. Plaintiffs argue that the taking of land into trust in this case was not supported by a rational purpose because the Lower Brule Sioux Tribe had not proposed an actual intended use for the property. *Id.* Without such a proposed use being tendered to the Secretary, the plaintiffs argue that the Secretary's action could not have been supported by a rational purpose. *Id.*

Plaintiffs' argument ignores the state of the administrative record before this Court. On March 30, 1990, the Chairman of the Lower Brule Sioux Tribe sent a letter to the BIA asking that the land in question be taken into trust. A.R. 17, Exhibit. In that letter, the Chairman stated that the tribe intended to use the land to create an industrial park to which the tribe would try to attract businesses. *Id.* The tribe proposed to negotiate with these businesses preferential employment provisions for Native Americans and thereby provide increased economic benefit

for the tribe and surrounding communities. *Id.* This certainly provides the Secretary with a rational basis for its decision so that the taking in question does not violate the tenth amendment.

Plaintiffs make much of the fact that the tribe initially thought the Samsonite company would relocate to the proposed site. When the Samsonite company put its plans to move to the site on hold, plaintiffs seem to suggest that this somehow negated the tribe's intended use for the land. This is simply not the case. Although it is true that the tribe anticipated that the Samsonite company would set up a plant at the proposed site, the tribe's letter to the Secretary asking that the land be taken into trust does not mention the Samsonite plant. A.R. 17, Exhibit. Instead, the letter merely states a general purpose of creating an industrial park, which could be accomplished with any number of businesses aside from Samsonite. *Id.* The tribe's general proposed purpose for the land constitutes a rational purpose justifying the Secretary's decision.

Of course, the gravamen of plaintiffs' claim is the allegation that the tribe intended from the beginning to use the land not for an industrial park, but for gambling, and that the Secretary knew of this hidden purpose. The only support in the administrative record for plaintiffs' theory is the letter from plaintiff state of South Dakota to the BIA in which it asserted that "some" had suggested that the tribe would use the land to build a gambling casino. A.R. 22, Exhibit 15. This does not substantiate the plaintiffs' claims that the tribe's true hidden purpose for the land was to conduct gaming thereon and that the Secretary knew this, but turned a "blind eye" to the tribe's machinations. Furthermore, the Secretary

may take land into trust even when the tribe intends to use the land for gaming, although different regulations govern such acquisitions. Plaintiffs have failed to carry their burden of demonstrating a violation of the tenth amendment.

Plaintiffs also assert a claim that "25 U.S.C. § 465 constitutes an unlawful delegation of legislative power from Congress to the Executive Branch and therefore acquisition of land under this statute *in this case* was unlawful and unconstitutional." Plaintiffs' Amended Complaint, Cause of Action ¶ VI (emphasis added). Although the emphasized language would seem to indicate that this is an as-applied challenge, plaintiffs' claim is better characterized as a facial challenge to the statute. This is because plaintiffs argue that the delegation contained in section 465 is so broad and standardless that it is impossible to ascertain in any given case whether the Secretary has obeyed the will of Congress. *See* Plaintiffs' Amended Complaint ¶ XVI.

Congressional delegation of legislative power to another branch of government is valid "if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73, 109 S. Ct. 647, 655, 102 L. Ed. 2d 714 (1989) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105, 67 S. Ct. 133, 142, 91 L. Ed. 2d 103 (1946)). Prior to 1935, the United States Supreme Court never found a congressional delegation to be unconstitutional. *Id.* at 373, 109 S. Ct. at 655. Then, in 1935, the Court invalidated two statutes as excessive delegations. *Id.* (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935);

and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 466 (1935)). Following *Schechter* and *Panama Refining*, the Court again has failed to find any congressional delegation, some of which have been very broad, to be excessive. *Id.* As discussed below, it is clear that section 465 is also constitutional under the nondelegation doctrine.

From the mid- to late 1800s until 1934, Congress pursued an allottment policy with regard to Indians. This policy sought the assimilation of Indians into mainstream society and the eventual destruction of Indian society. Congress attempted to accomplish this mission by allotting Indian reservation land to individual Indians and then allowing those Indians to sell their allottments after a brief trust period. So-called surplus reservation lands were often sold outright to non-Indians without any intervening allottment trust period. The allotment policy was a failure.

In 1934, congressional policy toward Indians changed abruptly with the passage of the Indian Reorganization Act of 1934 (IRA), of which 25 U.S.C. § 465 is a part. *See* 25 U.S.C. §§ 461-479. The IRA discontinued the further allottments of Indian lands, extended indefinitely the period of trust on allotted land for which the trust period had yet to expire, and authorized the Secretary of the Interior to acquire further land to be held in trust for Indian tribes or individual Indians. *See* 25 U.S.C. §§ 462-63, 465. The purpose of the IRA was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." H.R. Rep. No. 1804, 73d Cong., 2d Sess., 1 (1934).

In section 465, Congress has clearly identified the public agency to which power is being delegated: the Secretary of the Interior. Furthermore, the context in which section 465 was passed clearly delineates the general policy to be applied and the bounds of that delegated authority. *See Mistretta*, 488 U.S. at 372-73, 109 S. Ct. at 655. That is, the Secretary is to acquire land for Indians to help reverse the effects of the Indians' loss of land under the allotment policy and to help Indians become more self-sufficient, both economically and otherwise. Therefore, the Court finds that section 465 does not represent an unconstitutional delegation of legislative power to the executive branch of government.

CONCLUSION

The Administrative Procedure Act (APA) waives the sovereign immunity of the United States to allow judicial review of administrative action where the relief requested is non-monetary. 5 U.S.C. § 702. However, this waiver of sovereign immunity is limited. The APA does not waive the sovereign immunity of the United States where another statute expressly or impliedly forbids the relief sought. *Id.* The Court finds that the Quiet Title Act (QTA), 28 U.S.C. § 2409a, specifically the QTA's prohibition on bringing suit to challenge the United States' title to Indian trust lands, impliedly forbids plaintiffs' suit under the APA. The Court also finds that 25 U.S.C. § 465 is constitutional both on its face and as applied in this case. Accordingly, it is hereby

ORDERED that defendants' motion to dismiss (Docket No. 31) is granted.

IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment (Docket No. 36) is denied.

IT IS FURTHER ORDERED that defendants' motion to strike (Docket No. 52) and plaintiffs' motion regarding defendants' response to statement of facts (Docket No. 56) are both denied as moot.

Dated this 1st day of April, 1994.

By the Court:

/s/ Richard H. Battey
RICHARD H. BATTEY
United States District Judge

Attest:

WILLIAM F. CLAYTON
Clerk

By: /s/ Alice R. Raesly
Deputy Clerk
(SEAL)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

Civ. 92-3023

STATE OF SOUTH DAKOTA and CITY OF OACOMA,
PLAINTIFFS

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR;
EDDIE BROWN, Assistant Secretary-Indian Affairs;
and JERRY JAEGER, Acting Area Director,
Bureau of Indian Affairs,
DEFENDANTS

[Filed April 1, 1994]

JUDGMENT

In accordance with the memorandum opinion filed herein, it is hereby

ORDERED that defendant shall have judgment against the plaintiff.

IT IS FURTHER ORDERED that costs in the amount of $———— shall hereinafter be taxed and inserted by the Clerk.

Dated this 1st day of April, 1994.

By the Court:

/s/ Richard H. Battey
RICHARD H. BATTEY
United States District Judge

Attest:

WILLIAM F. CLAYTON
Clerk

By: /s/ Alice R. Raesly
Deputy Clerk
(SEAL)

APPENDIX C

[DOI Logo]

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS
Interior Board of Indian Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

IBIA 91-82-A

STATE OF SOUTH DAKOTA and
TOWN OF OACOMA

v.

ABERDEEN AREA DIRECTOR,
BUREAU OF INDIAN AFFAIRS

APPEAL FROM A DECISION TO TAKE LAND
INTO TRUST STATUS FOR THE
LOWER BRULE SIOUX TRIBE

Decided June 12, 1992

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellants State of South Dakota and Town of Oacoma seek review of a March 22, 1991, letter from the Aberdeen Area Director, Bureau of Indian Affairs (BIA; Area Director), to the Lower Brule Sioux Tribe (Tribe). This letter informed the Tribe that certain properties located within the Town of Oacoma and Lyman County, South Dakota, would be accepted into trust status upon satisfactory elimination of several title problems set forth in a preliminary title opinion. For the reasons discussed below, the Board of Indian Appeals (Board) dismisses this appeal for lack of jurisdiction.

Background

The land at issue in this appeal is located next to Interstate Route I-90 in South Dakota. It is approximately 7 miles from the Tribe's reservation. The Tribe has statd that it intends to use the property for economic development purposes. Although the Tribe had attempted to develop a site on its reservation for this purpose, it indicated that it had been unable to attract businesses to the reservation despite the incentives it was offering, primarily because of the distance from I-90 and the lack of an airport.

By letter dated March 30, 1990, to the Superintendent, Lower Brule Agency, BIA, the Tribe requested that the land be taken into trust status for its benefit. The request was reviewed by the Superintendent, information was requested from various State agencies and subdivisions concerning the impact removal of the land would have on the State,

comments were received from State and local officials, legal opinions on the effect of a trust acquisition were requested and provided, and a recommendation was made by the Superintendent to the Area Director that the trust acquisition be approved.

In reviewing the request, the Area Director asked for and received a preliminary title opinion from the Department's Field Solicitor's Office. By letter dated September 17, 1990, a preliminary title opinion was provided. The opinion listed seven possible problems with title. It also stated that the Area Director would need "Central Office approval to place [the] property into trust status" (Letter at 2).

The Area Director forwarded the trust acquisition request and its supporting information to the Assistant Secretary—Indian Affairs. By memorandum dated December 13, 1990, the Acting Assistant Secretary responded:

> We have received your memorandum of August 10 with the attached documentation requesting our review and approval of a fee to trust transfer of approximately 91.96 acres located in Lyman County, South Dakota * * *.
>
> * * * * *
>
> The request is made pursuant to procedures promulgated under 25 CFR 151.3(a)(3) and 54 BIAM Bulletin No. 2, signed on April 20, 1990, which require review by the Secretary of all off-reservation fee-to-trust acquisitions, with the exception of those for housing for Oklahoma tribes and individuals.
>
> We have determined the proposed acquisition is consistent with applicable guidelines and

would be in the best interest of the [Tribe]. Therefore, you are authorized to accept the subject conveyance to the United States in trust for the [Tribe], subject to the receipt of satisfactory title evidence in accordance with 25 CFR 151.12.

By letter dated March 22, 1991, the Area Director informed the Tribe:

> Pursuant to 25 CFR this is to advise you of the proposed acceptance of certain properties into Trust status for the [Tribe]. * * *
>
> * * * * *
>
> Upon satisfactory elimination of the objections listed in the Preliminary Title Opinion, dated September 17, 1990, I intend to accept the property in Trust.

The Board received appellants' notice of appeal from this letter on April 22, 1991. Briefs were filed by appellants, the Area Director, and the Tribe.

Jurisdiction

[1] Although not raised by any party in the briefs in this matter, the Board finds that it must dismiss this appeal because it lacks jurisdiction. The Board has previously considered the precise situation raised in this appeal. In *City of Escanaba, Michigan* v. *Acting Minneapolis Area Director*, 19 IBIA 247 (1991), the Board stated:

> It is clear that, although the Acting Area Director notified appellant of the decision, the decision itself was made by the Assistant Secretary—Indian Affairs. The Board does not have

> jurisdiction to review decisions made by the Assistant Secretary, which are final for the Department of the Interior unless the Assistant Secretary provides otherwise in his decision. 25 CFR 2.6(c); *see, e.g., Spokane Tribe of Indians* v. *Acting Assistant Secretary—Indian Affairs*, 18 IBIA 379 (1990).
>
> Even if the Acting Area Director's January 23, 1991, letter is construed as a decision made by the Area Director, the Board would lack jurisdiction over this appeal under 43 CFR 4.331, which provides:
>
> > Any interested party affected by a final administrative action or decision of an official of the Bureau of Indian Affairs issued under regulations in Title 25 of the Code of Federal Regulations may appeal to the Board of Indian Appeals, except—
> >
> > * * * * *
> >
> > (b) Where the decision has been approved in writing by the Secretary or Assistant Secretary—Indian Affairs prior to promulgation.
>
> 19 IBIA at 247-48.

For the same reasons, the Board lacks jurisdiction to review this decision.[1]

---

[1] The Board would, however, like to refer BIA to 25 CFR 2.7(a) which provides that "[t]he official making a decision shall give all interested parties known to the decisionmaker written notice of the decision * * *." If parties were fully informed when the Assistant Secretary has been involved in the decisionmaking process, needless and useless administrative appeals, with their resulting delay, could be avoided.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the March 22, 1991, letter of the Aberdeen Area Director is dismissed for lack of jurisdiction.

/s/ Kathryn A. Lynn
KATHRYN A. LYNN
Chief Administrative Judge

I concur:

/s/ Anita Vogt
ANITA VOGT
Administrative Judge

APPENDIX D

[DOI Logo]

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF THE SECRETARY
Washington, D.C. 20240
Aberdeen Area Office
Branch of Realty

Dec. 13, 1990

Memorandum

To: Aberdeen Area Director
Acting

From: Assistant Secretary—Indian Affairs

Subject: Recommendation to Transfer to Trust Status Certain Off-Reservation Fee Land on behalf of the Lower Brule Sioux Tribe of Indians in South Dakota

We have received your memorandum of August 10 with the attached documentation requesting our review and approval of a fee to trust transfer of approximately 91.69 acres located in Lyman County, South Dakota, described as:

> A portion of the Northeast Quarter of the Northwest Quarter (NE-¼NW-¼) lying North (N) of Highway No. 16 (shown as Lot H-1 in Book 3 of Plats, page 108) and except Lot "A" of Lester's Addition (a subdivision of the NE-¼ NW-¼) of Section Twenty-four (24) and West Half of the Southwest Quarter (W-½SW-¼) of Section Thirteen (13), and the Northwest Quarter of the Northwest Quarter of the Northwest

Quarter (NW-¼NW-¼NW-¼) of Section Twenty-four (24), and the Northeast Quarter of the Northwest Quarter of the Northwest Quarter (NE-¼NW-¼NW-¼) of Section Twenty-four (24), and Northwest Quarter of the Southwest Quarter (NW-¼SW-¼) of Section Thirteen (13), Township One Hundred Four North (104N), Range Seventy-two (72), West of the Fifth Prime Meridian (W. 5th P.M.), Lyman County, South Dakota.

(As recited on Warranty Deed to UNITED STATES OF AMERICA IN TRUST FOR THE LOWER BRULE SIOUX TRIBE executed May 13, 1990.)

The request is made pursuant to procedures promulgated under 25 CFR 151.3(a)(3) and 54 BIAM Bulletin No. 2, signed on April 20, 1990, which requires review by the Secretary of all off-reservation fee-to-trust land acquisitions, with the exception of those for housing for Oklahoma tribes and individuals.

We have determined the proposed acquisition is consistent with applicable guidelines and would be in the best interest of the Lower Brule Sioux Tribe of Indians in South Dakota. Therefore, you are authorized to accept the subject conveyance to the United States in trust for the Lower Brule Sioux Tribe, subject to the receipt of satisfactory title evidence in accordance wih 25 CFR 151.12.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 94-2344SDRC

STATE OF SOUTH DAKOTA, ET AL., APPELLANTS

v.

UNITED STATES DEPARTMENT OF INTERIOR, ET AL., APPELLEES

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

The suggestion for rehearing en banc is denied. Chief Judge Arnold, Judge McMillian, Judge Beam, and Judge Murphy would grant the suggestion for rehearing en banc.

The petition for rehearing by the panel is also denied.

February 2, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk
U.S. Court of Appeals
Eighth Circuit

APPENDIX F

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 151

[1076-AD65]

Land Acquisitions

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final Rule.

SUMMARY: This rule establishes a 30-day waiting period after final administrative decisions to acquire land into trust under the Indian Reorganization Act and other federal statutes. The Department is establishing this waiting period so that parties seeking review of final decisions by the Interior Board of Indian Appeals or of decisions of the Assistant Secretary-Indian Affairs, will have notice of administrative decisions to take land into trust before title is actually transferred. This notice allows interested parties to seek judicial or other review under the Administrative Procedure Act and applicable regulations.

EFFECTIVE DATE: April 24, 1996.

FOR FURTHER INFORMATION CONTACT: Mary Jane Sheppard, Staff Attorney, Office of the Solicitor, Division of Indian Affairs, Room 6456, Main Interior Building, 1849 C Street, NW, Washington, DC 20240; Telephone (202) 208-6260.

SUPPLEMENTARY INFORMATION: On July 15, 1991, the proposed rule for off-reservation land

acquisitions for Indian tribes was published in the Federal Register (56 FR 32278-32280). On June 23, 1995, the final rule was published at 60 FR 32878. That rulemaking supplemented the existing regulations in part 151. This procedural rule adds a subsection to existing 25 CFR 151.12, Action on requests.

Background

In response to a recent court decision, *State of South Dakota* v. *U.S. Department of the Interior*, 69 F.3d 878 (8th Cir. 1995), the Department of the Interior is establishing a procedure to ensure the opportunity for judicial review of administrative decisions to acquire title to lands in trust for Indian tribes and individual Indians under section 5 of the Indian Reorganization Act (IRA) (Pub. L. 73-383, 48 Stat. 984-988, 25 U.S.C. 465). Following consideration of the factors in the current regulations and completion of the title examination, the Department, through Federal Register notice, or other notice to affected members of the public, will announce any final administrative determination to take land in trust. The Secretary will not acquire title to the land in trust until at least 30 days after publication of the announcement. This procedure permits judicial review before transfer of title to the United States. The Quiet Title Act (QTA), 28 U.S.C. 2409a, precludes judicial review after the United States acquires title. See, *e.g.*, *United States* v. *Mottaz*, 476 U.S. 834 (1986); *North Dakota* v. *Block*, 461 U.S 273 (1983); *Florida* v. *Department of Interior*, 768 F.2d 1248 (11th Cir. 1985).

Section 5 of the IRA authorizes the Secretary to acquire land in trust for Indians and Indian tribes:

(1) Within or adjacent to an Indian reservation; or (2) for purposes of facilitating tribal self-determination, economic development, or Indian housing. *State of South Dakota*, a case involving an off-reservation trust land acquisition, held Section 5 of the IRA unconstitutional on the ground that it violates the nondelegation doctrine. The court's decision was based in substantial part on the understanding that judicial review is not available to challenge the Secretary's action. The court noted that "judicial review is a factor weighing in favor of upholding a statute against a nondelegation challenge." The rule ensures that such review is available before formal conveyance of title to land to the United States, when the QTA's bar to judicial review becomes operative. Judicial review is available under the APA because the IRA does not preclude judicial review and the agency action is not committed to agency discretion by law within the meaning of the APA.

While the Eighth Circuit decision precludes the Secretary from taking into trust the land at issue in that particular case, new trust acquisitions will be made on a case-by-case basis. The procedure announced in today's rule, however, will apply to all pending and future trust acquisitions.

The Department certifies that this procedural rule meets the standards provided in Sections 2(a) and 2(b)(2) of Executive Order 12778.

The Department has determined that this rule:

—Does not have significant federalism effects.

—Will not have significant economic impact on a substantial number of small entities under

the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

—Does not have significant takings implications under E.O. 12630.

—Does not have significant effects on the economy, nor will it result in increases in costs or prices for consumers, individual industries, Federal, State, or local governments, agencies, or geographical regions.

—Does not have any adverse effects on competition, employment, investment, productivity, innovation, or the export/import market.

—Is categorically excluded from the National Environmental Policy Act of 1969 because it is of an administrative, technical, and procedural nature. Therefore, neither an environmental assessment nor an environmental impact statement is warranted.

This rule is not a significant rule under E.O. 12866 and does not require approval by the Office of Management and Budget.

This rule is not a major rule as defined in 5 U.S.C. 804. The annual number of tribal requests to place lands in trust is small. There will be costs incurred by a party seeking judicial review. The author of this rule is: Mary Jane Sheppard, Office of the Solicitor, U.S. Department of the Interior.

Because this is a procedural rule under Section 553(b)(3)(A) of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, it is exempt from requirements for notice and comment rulemaking.

List of Subjects in 25 CFR Part 151

Indians—lands.

For reasons set out in the preamble, Part 151 of Title 25, Chapter I of the Code of Federal Regulations is amended as set forth below.

PART 151—LAND ACQUISITIONS (NONGAMING)

1. The authority for part 151 continues to read as follows:

Authority: R.S. 161: 5 U.S.C. 301. Interpret or apply 46 Stat. 1106, as amended; 46 Stat. 1471, as amended; 48 Stat. 985, as amended; 49 Stat. 1967, as amended, 53 Stat. 1129; 63 Stat. 605; 69 Stat. 392, as amended; 70 Stat. 290, as amended; 70 Stat. 626; 75 Stat. 505; 77 Stat. 349; 78 Stat. 389; 78 Stat. 747; 82 Stat. 174, as amended, 82 Stat. 884; 84 Stat. 120; 84 Stat. 1874; 86 Stat. 216; 86 Stat. 530; 86 Stat. 744; 88 Stat. 78; 88 Stat. 81; 88 Stat. 1716; 88 Stat. 2203; 88 Stat. 2207; 25 U.S.C. 2, 9, 409a, 450h, 451, 464, 465, 487, 488, 489, 501, 502, 573, 574, 576, 608, 608a, 610, 610a, 622, 624, 640d-10, 1466, 1495, and other authorizing acts.

2. Section 151.12, Action on requests, is amended by designating the existing text as paragraph (a) and by adding a new paragraph (b) to read as follows:

§ 151.12 Title examination.

* * * * *

(b) Following completion of the Title Examination provided in § 151.13 of this part and the exhaustion of any administrative remedies, the Secretary shall

publish in the Federal Register, or in a newspaper of general circulation serving the affected area a notice of his/her decision to take land into trust under this part. The notice will state that a final agency determination to take land in trust has been made and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published.

Dated: April 17, 1996.

Ada E. Deer,

Assistant Secretary, Indian Affairs.

[FR Doc. 96-9922 Filed 4-29-96; 8:45 am]

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(2)

Supreme Court, U.S.
FILED
JUL 5 1996
CLERK

No. 95-1956

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,

Petitioners,

v.

STATE OF SOUTH DAKOTA AND CITY OF OACOMA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

WHETHER SECTION 5 OF INDIAN REORGANIZATION ACT OF 1934, 25 U.S.C. 465, WHICH AUTHORIZES THE SECRETARY OF THE INTERIOR TO ACQUIRE INTERESTS IN LAND "FOR THE PURPOSE OF PROVIDING LAND FOR INDIANS" IS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER.

WHETHER THIS COURT'S SPARINGLY EXERCISED POWER TO GRANT CERTIORARI, VACATE AND REMAND WITHOUT PLENARY CONSIDERATION IS AVAILABLE TO ALLOW A LOSING PARTY TO ALTER A POSITION IT TOOK BELOW AND WHICH IT HAS TAKEN HISTORICALLY AND IN THIS COURT.

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Furber, *Two Promises, Two Propositions: The Wheeler-Howard Act as a Reconciliation of the Indian Law Civil War*, 14 U. of Puget Sound L. Rev. 211 (1991) 17

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STATEMENT OF THE CASE

Respondents State of South Dakota and City of Oacoma brought suit against the United States Department of the Interior, invoking federal question jurisdiction and the Administrative Procedures Act (APA). The State and City challenged a decision of the Department of the Interior to take ninety-one (91) acres of off-reservation land, located partially within the City of Oacoma, in trust status for the Lower Brule Sioux Tribe, pursuant to 25 U.S.C. § 465. The United States District Court for the District of South Dakota dismissed the case, sua sponte determining that the APA does not waive the Department of Interior's sovereign immunity, App. 51a[1]; the court rejected the City and State contention that Section 5 was unconstitutional. *Id.* The United States Court of Appeals for the Eighth Circuit reversed. The court of appeals found that the "very broad language of Section 465" contained no "perceptible 'boundaries,' [and] no 'intelligible principles,' " *Id.* at 6a-7a; that the legislative history of the act provided no guidance, *Id.* at 14a; that the Secretary of the Interior had historically "interpreted the statute as broadly as possible, consistent with its literal language," *Id.* at 13a; and that the statute did not provide for judicial review. *Id.* at 14a. The court thus concluded that 25 U.S.C. § 465 is an unconstitutional delegation of legislative power.

1. This case arises in the context of the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*, enacted in 1934.

---

[1] The term "App." refers to the Appendix filed as part of the government's Petition.

The bill leading to this Act, as originally proposed, was a far ranging, meticulously organized plan for the reorganization and improvement of Indian tribes that contained constitutionally adequate standards, rule making authority and clear and specific statements of purpose. *See* Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess. at 1-14 (1934) (hereinafter House Hearings).

Congress rejected those basic policy choices, however, and the bill was entirely rewritten by those "who objected most strenuously to the original" bill. 78 Cong. Rec. 11,732 (1934). The revised bill "represent[ed] the viewpoint of the *critics*" of the original bill. *Id.* (emphasis added). The clear and specific statements of purpose and salient rule making authority were eliminated, along with most of the original bill, leaving little or no relevant direction to the federal, state or tribal governments. Contrast, House Hearings, *supra*, at 1-14 with 48 Stat. 984 (1934).

2. Following the enactment of 25 U.S.C. § 465, the Secretary of the Interior began to take lands into trust. The Secretary of the Interior, however, failed to promulgate regulations guiding his acquisition of trust lands from 1934 until 1980, presumably in recognition of the fact that Congress had eliminated the rule making power from the original bill. In 1980, the Secretary promulgated certain regulations, but specifically recognized the "discretionary nature of trust land acquisition." 45 Fed. Reg. 62,035 (Sept. 18, 1980). The United States thereafter successfully argued in the circuit court that the new regulations did not confine the Secretary's discretion and that the trust acquisition was, even under the regulations,

committed to agency discretion. *Florida Dept. of Business Regulation v. United States Dept. of Interior*, 768 F.2d 1248, 1256-1257 (11th Cir. 1985). It repeated that argument to this Court in successfully resisting certiorari. *Brief for the Federal Respondents in Opposition, Florida v. United States Dept. of Interior*, No. 85-821, pp. 10-12 (hereinafter *Florida R.B.*) *See Florida v. Dept. of Interior*, 475 U.S. 1011 (1986). The United States maintained this position through 1995, *see* 60 Fed. Reg. 32,874 (June 23, 1995), and indeed throughout this entire litigation, App. 6a, abandoning the position only after it failed to obtain rehearing below.

3. This case arises out of the Lower Brule Sioux Tribe's request that the Department of the Interior place certain off-reservation land owned by the tribe into trust status. According to the United States, the Lower Brule Reservation occupies 235,800 acres; of these acres, 119,900 are in Indian ownership or in federal ownership for Indian use. Pet. at 8. The 1990 Indian population of the Lower Brule Reservation was 994. *See* 1990 Census of Population and Housing, Summary Population and Housing Characteristics, South Dakota, p. 175. According to the Administrative Record, the tribe had constructed an industrial park on the reservation. J.A. 293.[2] The tribe, however, purchased the 91 acres of off-reservation land at issue here and applied to Interior to take the land into trust to create an industrial park. As the opinions indicate, there was controversy on the question of a "Samsonite" factory on the proposed site, App. 48a, and on

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[2] The term "J.A." refers to the Joint Appendix compiled in the Court of Appeals.

whether the tribe actually intended the site to be used for gambling. *Id.*; *see also Id.* at 3a.

The district court found that neither the Acting Area Director, who was responsible for the initial review of the Agency Superintendent's recommendation, nor the Acting Assistant Secretary-Indian Affairs, performed any significant analysis of the application. The district court described the Bureau of Indian Affairs (BIA) Acting Area Director's memorandum as containing a "brief outline of the documents being forwarded, but no real discussion of the elements of 25 C.F.R. § 151.10." App. 40a. Similarly, the December 13, 1990, memorandum of the Acting Assistant Secretary-Indian Affairs which determined that the land should be taken into trust, "contained no discussion of the factors found in 25 C.F.R. § 151.10. . . . " *Id.* See, *Id.* at 61a. The Acting Assistant Secretary's memorandum of December 13, 1990, stated that the land would be taken into trust after "receipt of satisfactory title evidence in accordance" with 25 C.F.R. 151.12. *Id.* at 62a. No notice of the Assistant Secretary's decision was given to the State of South Dakota or to the City of Oacoma, both of which had protested the application from the very first. *Id.* at 2a; *see also Id.* at 32a-40a. The State was later sent a March 22, 1991, letter of the Area Director informing the Tribe that the land would be taken into trust after certain title problems were addressed. J.A. 366; App. 56a. The State thereafter petitioned the Interior Board of Indian Appeals (IBIA) to review the Area Director's decision, but the IBIA sua sponte dismissed the appeal because the decision actually had been made by the Assistant Secretary-Indian Affairs and such decisions are not reviewable by the IBIA. App. 2a; *South Dakota v. Aberdeen Area Director, Bureau of Indian Affairs*, 22 IBIA 126 (1992), reprinted at App. 55a-60a.[3]

4. Following the dismissal of the State's administrative action, the State and the City on July 13, 1992, filed a Complaint challenging the Assistant Secretary's decision. J.A. 7. Although the Assistant Secretary-Indian Affairs, had stated in his December 1990, memorandum that the lands should not be taken into trust until "satisfactory title evidence in accordance" with 25 C.F.R. 151.12 was received, the United States nonetheless acquired the land in trust on November 30, 1992, even though the instant litigation was then pending. J.A. 349. The United States apparently did not believe that an action in federal court challenging the propriety of an acquisition constituted an "infirmity" on the title. *See* 25 C.F.R. 151.12. The State's Amended Complaint asserted that 25 U.S.C. § 465 "constitutes an unlawful delegation of legislative power from Congress to the Executive Branch. . . . " J.A. 28.

The United States, in accordance with the policy it had followed since 1934, and in accordance with the view it had argued in this Court, *see Florida R.B., supra*, moved to dismiss the action on the grounds that the APA did not

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[3] As the United States notes, the IBIA determined that it "lacked jurisdiction to review decisions made by the Assistant Secretary, which are final for the Department of the Interior, unless the Assistant Secretary provides otherwise in his decision." *See* Pet. at 9, n.4. The United States neglects to add that Department of Interior policy is that the "discretionary decision on whether to accept" off-reservation land in trust rests with the Assistant Secretary. Thus, the administrative appeal process is generally unavailable with regard to off-reservation transfers. J.A. 264.

authorize judicial review because the matter was "wholly committed to the Secretary's discretion." App. 41a.

The district court did not address this argument but ruled, sua sponte, that the Quiet Title Act precluded the suit. *Id.* at 51a. The district court also rejected the State and City's contention that 25 U.S.C. § 465 constituted an unlawful delegation of legislative power to an administrative agency. *Id.* at 49a-51a.

5. The court of appeals reversed. App. 1a-15a. The majority indicated that the district court likely erred in finding that the Quiet Title Act precluded APA review of "agency action by which the United States acquires title." *Id.* at 4a n.1. *See also Id.* at 30a. (Murphy, J., dissenting.)

Nonetheless, the majority found that judicial review of the agency action was not available, concluding that 25 U.S.C. § 465 provided for "unrestrained power . . . free of judicial review." App. 14a. *See also Id.* at 15a. The court found that "25 U.S.C. § 465, the statute authorizing acquisition of the land, is an unconstitutional delegation of legislative power." App. 1a-2a. The court carefully examined the precise wording of 25 U.S.C. § 465, which allows an acquisition of land "within or without" a reservation "for the purpose of providing land for Indians." 25 U.S.C. § 465, *quoted in* App. 6a-7a. The court recognized that there are

> no perceptible 'boundaries,' no 'intelligible principles,' within the four corners of the statutory language that constrain this delegated authority – except that the acquisition must be 'for Indians.'

App. 7a. The court illustrated the unchecked breadth of the congressional language by commenting that it would permit the Secretary to acquire a "factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe,[4] thereby removing these properties from the state and local tax rolls." *Id.* at 7a. The court noted that the "literal terms" of the statute would likewise allow the purchase of the Empire State Building for a tribal leader.[5] *Id.*

The court also observed that the "legislative history of 25 U.S.C. § 465 suggests that Congress did not intend to delegate unrestricted power to acquire land 'for Indians.' " App. 9a. The court's examination of that history thus "suggest[ed]," *see id.* that the framers intended that the Secretary be enabled to "acquire rural lands suitable for farming, grazing, and logging by Indians. . . . " *Id.* at 11a. The court concluded, however, that "in drafting § 465, Congress failed to include standards to reflect its limited purpose." *Id. See also Id.* at 14a. The court found support for this limited authorization in the fact

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[4] Indeed, one of the amici below asserted that it had already established a "championship 27-hole golf course" on land acquired in trust under 25 U.S.C. § 465. Brief of Amici Curiae [Jicarilla Apache Tribe et al.] in Support of Petition for Rehearing and Suggestion for Rehearing *En Banc*, p. 10.

[5] The court thus implicitly acknowledged that the United States had been unable to answer the charge of the State that the statute would allow the Secretary of the Interior to "acquire all or any part of the City of New York, the City of Saint Louis, the City of Rapid City . . . in trust." *See* Appellants' Brief, *State of South Dakota and City of Oacoma v. United States Department of Interior, et al.*, U.S. Court of Appeals for the Eighth Circuit, Civ. No. 94-2344 at 42.

that "Congress in § 465 addressed only one intergovernmental issue – it made the lands taken in trust exempt from state and local property taxes." App. 11a. As the court pointed out, when "industrial or commercial" uses are allowed, "other important issues inevitably arise." *Id.* The court thus drew attention to the fact that a primary issue facing the State and the City after a trust acquisition is whether the State and City will continue to be able to regulate land use, an issue left unanswered by the statute.[6] The court noted that the Department of Interior's Field Solicitor had acknowledged the open nature of the regulatory issue, *Id.* at 11a-12a, *see generally*, J.A. 180-184, and that the result would be that the State and City would be forced to "establish their right to regulate the trust land in court, where BIA will no doubt argue that state and local regulatory powers are preempted." App. at 12a. The court found this to result in a "legislative void" and that

> Congress, not the BIA, and indeed not the courts, should define in the first instance the extent to which lands taken in trust for industrial and commercial Indian use are thereby freed from state and local zoning ordinances, building codes, health and safety regulations, and other exercises of the police power.

Id.

The court then turned to the regulations promulgated by the Secretary. The court essentially determined that these regulations provided no narrowing of the statute,

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[6] *See* n.9, *infra*.

"consistent with its [the statute's] literal language." *Id.* at 13a.

The court concluded that 25 U.S.C. § 465, as enacted and implemented, resulted in "an agency fiefdom whose boundaries were never established by Congress, and whose exercise of unrestrained power is free of judicial review. It is hard to imagine a program more at odds with the separation of powers principles." *Id.* at 14a.

6. The United States applied for rehearing and rehearing en banc. The United States did not retreat from its view that judicial review was unavailable under the statute but instead argued that "if the panel was of the view that the absence of the judicial review would render that statute unconstitutional, it was obliged to construe the Act, if reasonably possible, to allow judicial review in order to preserve its constitutionality." Appellees' Petition for Rehearing with Suggestion for Rehearing En Banc, *State of South Dakota and City of Oacoma v. United States Department of Interior, et al.*, 94-2344 at 15. Rehearing was denied. Of the eleven active judges, four would have granted rehearing en banc. App. 63a.

REASONS FOR DENYING THE PETITION

The United States posits four general arguments for granting the petition. Each is deficient.

A. The Government Has Failed to Demonstrate the National Importance of this Litigation.

The government first insists that 25 U.S.C. § 465 is a central, crucial element of federal legislation. According to the Petition, the section "has great practical significance to the Secretary's day-to-day administration of the IRA." Pet. at 17.

The Petition, submitted in June of 1996, contradicts the commentary to a new trust land rule in April 1996 promulgated by the Department of the Interior. *See* App. 64a-69a. According to the commentary to the rule: "The annual number of tribal requests to place lands in trust is small." *Id.* at 67a. The commentary also asserts that the rule "[d]oes not have significant federalism effects." *Id.* at 66a. The government's characterizations of the statute are contradictory and cannot be credited.

Two additional factors demonstrate the lack of importance. First, the negation of 25 U.S.C. § 465 in no way precludes a tribe or an individual Indian from acquiring land *in fee* on or off a reservation. The only result is that the United States will not routinely take that land *into trust*. For the United States to establish the importance of this provision, it must demonstrate that there is a real necessity for tribes and Indians to hold vast amounts of land in *trust* rather than in *fee*; this it has failed to do.

Second, to the degree that there is a problem, it may easily be handled by Congress which merely is required to enact a constitutionally sufficient statute. Congress has enacted other statutes which appear to be constitutionally sufficient and which allow the taking of land into trust

for certain restored tribes, *see, e.g.*, 25 U.S.C. §§ 713f, 714e(b), (c), and certainly could enact a more generic constitutional statute allowing trust conversions if it so desired.[7]

B. The Government's Arguments with Regard to Non-Constitutional Issues Are without Merit.

The Government contends that the court below erred by not considering non-constitutional grounds relating to judicial review which may have avoided a need for a constitutional decision.

1. The argument that the court should have considered whether the Quiet Title Act precludes judicial review is without merit.

The government contends that the court of appeals erred by failing to consider whether the Quiet Title Act precludes judicial review. The court below, however, clearly indicated that it did not believe that the Quiet Title Act precluded judicial review. *See* App. 4a n.1. But the answer to this question is, in any event, irrelevant to this litigation. Had the court definitively held that the Quiet Title Act *did* preclude judicial review, it could nonetheless have considered the constitutional question. The court, however, considered that the Quiet Title Act did *not* preclude judicial review, and it therefore addressed

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[7] We note that any retroactivity of the decision below would presumably be limited to a maximum of six years, *Nichols v. Rysavy*, 809 F.2d 1317 (8th Cir. 1987), *cert. denied*, 484 U.S. 848 (1987) and by the principle of latches.

the second question, i.e. whether judicial review was unavailable because the matter was committed to the discretion of the agency. Because it ultimately determined that judicial review was unavailable for that reason, the outcome of the first question was irrelevant.

2. The court determined that judicial review was unavailable because the matter was committed to the discretion of the agency.

The government appears to argue that the court of appeals did not actually determine the question of whether judicial review was unavailable because the matter was committed to the discretion of the agency. The court's opinion, however, indicates otherwise. First, the court found that 25 U.S.C. § 465 created an "unrestrained power . . . free of judicial review." App. 14a. Next, the court "conclude[d]" that 25 U.S.C. § 465 failed three specified "nondelegation criteria," including that relating to judicial review. *Id.* at 15a. The court of appeals moreover found that neither the statute (*Id.* at 9a) nor the implementing regulations (*Id.* at 11a) placed any restraints upon the Secretary. The effect of such findings is to commit the matter to the discretion of the agency and so deprive the courts of judicial review powers. *Florida Dept. of Business Regulation*, 768 F.2d at 1256-1257. That this was the conclusion of the court of appeals is apparent from the plain text of the opinion.

We finally note the incongruity of the present federal position in light of the fact that it had argued to both courts below that this matter was "committed to the agency's discretion;" that the government had convinced

the Court of Appeals for the Eleventh Circuit of the correctness of that position, *Florida Dept. of Business Regulation*, 768 F.2d at 1256-1257; that the government had made the same argument to this Court in successfully persuading the Court to deny certiorari, *Florida R.B.*, at 10-12; and that the government in its regulations has made it clear that those regulations did not impose binding restrictions on it. *See, e.g.*, 60 Fed. Reg. 32,874 (June 23, 1995). *See also* 25 C.F.R. 1.2.

C. The Court of Appeals Correctly Analyzed the Constitutional Issue Relating to 25 U.S.C. § 465.

This Court has recently reiterated that the

> fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, U.S. Const., Art. I, § 1, and may not be conveyed to another branch or entity. *Field v. Clark*, 143 U.S. 849, 892 (1892).

Loving v. United States, ___ U.S. ___, 116 S.Ct. 1737, 1744 (1996). *Loving* also stresses that a " 'delegation of power to make the law, which necessarily involves a discretion as to what it shall be. . . . cannot be done.' " *Id. quoting Field*, 143 U.S. at 693-694. *See also Panama Refining Company v. Ryan*, 293 U.S. 388, 421 (1935). *Skinner v. Mid-America Pipeline Company*, 490 U.S. 212, 219 (1989) *quoting American Power and Light Co. v. S.E.C.*, 329 U.S. 90, 105 (1946) in turn finds that it is

> constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.

Whether consulting the statutory text, the legislative history, or administrative interpretations, no "boundaries of this delegated authority" can be located with regard to 25 U.S.C. § 465.

1. The text of the statute does not limit the delegation to the Secretary.

25 U.S.C. § 465 states:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians.
>
> For the acquisition of such lands . . . there is authorized to be appropriated . . . a sum not to exceed $2,000,000 in any one fiscal year. . . .

The text of the statute thus allows the Secretary to acquire "lands . . . for the purpose of providing lands for Indians." The text does not define the " 'boundaries' " of the Secretary's authority, *Skinner*, 490 U.S. at 219. Nor does the text make the "important choices of social policy" or set down an " 'intelligible principle' " either to guide the exercise of discretion, or to assure that a reviewing court is able to test the exercise of power "against ascertainable standards." *Industrial Union Department, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring).[8]

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[8] The dissent below indicated its view that the Secretary's authority to acquire land in trust is "explicitly" limited by the text which authorized the appropriation of only a "limited

The federal argument with regard to the text of the act is not clear, but is apparently that this Court in "numerous rulings" has "consistently upheld broader grants of authority to executive officials." Pet. at 20. The United States cites a quartet of cases, each of which is distinguishable from our own. *Lichter v. United States*, 334 U.S. 742 (1948) clearly relies upon war powers to validate the delegation there at issue. Furthermore, the allegedly broad term, "excessive profits," had already been addressed by a "War Department Directive of August 10, 1942" which was part of the information before Congress. *Lichter*, 334 U.S. at 777. *Yakus v. United States*, 321 U.S. 414 (1944), likewise relies upon war powers not relevant here. Furthermore, the term "fair and equitable" did not stand alone, but rather was further defined by reference to base line prices of 1941, *Id.* at 421, and through a comprehensive listing of purposes. *Id.* at 420. *FPC v. Hope Natural Gas Company*, 320 U.S. 591 (1944), does not appear to have even expressly considered the delegation question. *NBC v. United States*, 319 U.S. 190 (1943) analyzes a statute allowing the Federal Communications Commission (FCC) to regulate broadcast licensing as the "public interest, convenience or necessity" require. These words did not, however, stand alone and the statute also provided that

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amount of funds with which land could be acquired. . . . " App. 21a. As the United States has admitted in other litigation, however, "the normal practice under 465 [is that] the tribe itself purchased the land and acquired fee title." Defendant's Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction, *State of Wisconsin, et al. v. United States Department of the Interior*, No. 96-C-263-S (April 23, 1996) (District Court for the Western District of Wisconsin) p. 13 n.14.

the FCC had the specific power to "[c]lassify" radio stations, to prescribe the "nature of the service to be rendered" by each station, to make regulations "necessary to prevent interference between stations" and also to make special regulations applicable to "radio stations engaged in chain broadcasting." *Id.* at 214-215, *quoting* 47 U.S.C. § 303. This Court also derived the precise definition of the term "public interest" from the terms of the statute itself as the "interest of the listening public 'in the larger and more effective use of radio.' " *Id.* at 216, *quoting* 47 U.S.C. § 303(g).

In sum, this Court upholds statutory language against a delegation challenge only when it contains a discernable "concrete" criterion, *NBC*, 319 U.S. at 216, that has provided the necessary "intelligible principle." *Industrial Union Department*, 448 U.S. at 686. No such criterion lies in 25 U.S. § 465 which provides that the Secretary of the Interior can acquire "lands . . . for the purpose of providing land for Indians."

2. The legislative history of the Act does not provide meaningful guidance.

As we note above, the bill as originally proposed contained clear statements of purpose, specific rule making authority, and constitutionally adequate standards. House Hearings, at 1-14. For example, Title I of the original bill, *Id.* at 1-7, created well defined governmental powers in the tribes.[9] The original bill specifically provided for Indian lands in Title III. *Id.* at 8-11. Section 1 of

[9] The writers of the bill recognized that the tribes in 1933-1934 then had no legitimate claim to real governmental power. *See generally*, Furber, *Two Promises, Two Propositions: The Wheeler-Howard Act as a Reconciliation of the Indian Law Civil War*, 14 U. of Puget Sound L. Rev. 211, 239-260 (1991). Therefore, the original bill proposed that an Indian community which desired to exercise governmental authority within a particular area would identify that area and apply for a charter to the Secretary of the Interior for that area. *See* House Hearings at 1-3. Senator Wheeler objected, Hearing before the Committee on Indian Affairs, U.S. Senate, 73d Cong., 2d Sess. on S.2755 (1934) at 66-68, and ultimately told the Senate that the Committee had "eliminated from the bill as originally presented the right of the Indians to make laws upon the reservations." 78 Cong. Rec. 11,123 (1934).

Title III set out a detailed declaration of policy. *Id.* at 8. Under Section 6, the Secretary of the Interior was to study the economic and physical characteristics of reservations and create consolidated areas based upon those studies. *Id.* at 8-9. The Secretary was authorized under Section 7 to promulgate "rules and regulations" to guide the acquisition of lands and to acquire lands "for Indians for whom reservation or other land is not now available and who can make beneficial use thereof" and to acquire lands for the purpose of "blocking out and consolidating areas classified for the purpose pursuant to the authority of Section 6 of this title." *Id.* at 9. Under Section 16 of Title III, the United States assumed several specific "governmental obligations of the State or county" with regard to lands under reservation jurisdiction. House Hearings at 11. Title III §§ 6, 11, 14, 15, indicated the importance of farming, grazing and forestry. *See* House Hearings at 8-11.

The original bill thus made the basic policy choices regarding land acquisition but these policy choices were

resoundingly rejected by Congress. Consequently, the bill was entirely rewritten by those "who objected most strenuously to the original" bill and the revised bill "represents the viewpoint of the critics" of the original bill. 78 Cong. Rec. 11,732 (1934). The detailed statement of general "policy" for the act as a whole set out in Title I, Section 1 was eliminated. Moreover, Congress entirely deleted other provisions of Title I, which would have carefully defined the extent of tribal governmental powers, and thus left the federal, state, local and tribal governments in virtual chaos with regard to the extent of their respective governmental powers. See, App. 11a-12a. Various other sections relating specifically to land acquisition were likewise decimated. Section 1 of Title III of the original bill, which set out a comprehensive policy specific to the acquisition of lands, was entirely deleted. Section 3 of Title III of the original bill, which provided for disposal of lands outside of consolidation areas was deleted. Section 6, which provided for the "orderly and sound acquisition" of consolidated lands was deleted. But see, 48 U.S.C. § 984, sec. 4 (voluntary exchanges for "proper consolidation" of lands).

Section 7 of Title III, the predecessor to 25 U.S.C. § 465, was stripped of intelligible standards and renumbered Section 5. Compare House Hearings at 9 with 25 U.S.C. § 465. Critically, the rule making authority under Section 7 was eliminated. The identification of purpose was essentially eliminated and the bill eliminated the statement of standards for land to be acquired. Section 5 of the revised version contains no standards: the language allows acquisitions "for the purpose of providing lands for Indians." 25 U.S.C. § 465. Moreover, Congress

put in limbo the question of whether it would assume the specified "governmental obligations of the State or county" with regard to lands under reservation jurisdiction by eliminating the salient provisions of Section 16 of Title III of the original bill.

Because of the treatment by Congress of the original bill, the legislative history cannot be said to yield intelligible standards.

3. The regulations promulgated by the Secretary do not provide adequate guidance.

The United States argues that regulations promulgated by the Secretary serve to confine the Secretary's discretion under 25 U.S.C. § 465 and so have the effect of making that statute constitutional. The government's argument fails on three points.

a. The Secretary's authority to make rules is doubtful.

The Indian Reorganization Act, as originally proposed, contained specific authority to promulgate "rules and regulations" to acquire lands for specific purposes. *See* Title III, § 7 at House Hearings at 9. This rule making authority was eliminated from the final bill. It therefore appears doubtful that the Secretary has the authority to adopt the regulations in question. *Gulf Oil Corp. v. Copp Paving Co. Inc.*, 419 U.S. 186, 200 (1974). This is especially so because rule making authority was retained with regard to at least one other provision of the bill. *See* 48

Stat. 984, § 6 (1934); *Russello v. United States*, 464 U.S. 16, 23 (1983). *But see* 25 U.S.C. §§ 2, 9.

b. The rules promulgated in 1980 and thereafter were not intended by the Secretary to confine his discretion.

The current position of the government, arguing that the regulations set out in 25 C.F.R. 151 confine the discretion of the Secretary, is anomalous indeed. The first rule which allegedly guided the discretion of the Secretary was promulgated on September 18, 1980, 46 years after the passage of the Indian Reorganization Act. It is a unique argument, accompanied by no authority, that promulgation of a rule 46 years after enactment of a statute can have the effect of "constitutionalizing" a statute. In any event, the Secretary's commentary on the 1980 rule drew attention to the "discretionary nature of trust land acquisitions. . . . " 45 Fed. Reg. 62,035 (Sept. 18, 1980).[10] Five years later, the United States successfully argued that trust acquisitions were "committed to the Secretary's discretion" and did not provide law that a reviewing court could apply. *Florida Dept. of Business Regulation*, 768 F.2d at 1256. The United States repeated that argument to

[10] An additional anomaly is that in 1978, the rule was formally proposed and the Secretary noted that the provisions of the proposed rule relating to acquisitions for tribes "reflect the policy expressed in *recent acts* of Congress authorizing acquisition of lands for tribes." 43 Fed. Reg. 32,312 (July 26, 1978) (emphasis added). The reference to "recent acts" may *not* have included the Indian Reorganization Act, which had been enacted 44 years prior to the 1978 rule.

this Court, *see Florida R.B.*, at 10-12, and this Court ultimately denied certiorari. *Florida v. Department of Interior*, 475 U.S. 1011 (1986). The Secretary in 1991 repeated that the "Secretary is vested by statute with broad discretionary authority to accept land in trust status. . . . " 56 Fed. Reg. 32,278 (July 15, 1991), and referred to the "discretionary decisions" made by the Secretary. *Id.* In 1995, the Secretary asserted that "the decision whether to accept title in trust status is a discretionary one. . . . " 60 Fed. Reg. 32,874 (June 23, 1995). *See also* 25 C.F.R. 1.2.

c. The regulations do not confine the discretion of the Secretary in any event.

The Secretary and the courts have agreed that the Department of Interior's regulations do not provide standards which are enforceable in court and that the regulations commit the decision on whether to take land into trust to the discretion of the Secretary.

This conclusion follows from the text of the regulations. The government nonetheless contends that 25 C.F.R. 151.3 states a "general policy regarding trust land acquisitions. . . . " Pet. at 6. This section allows the Secretary, inter alia, to acquire land in trust for a Tribe when the Tribe already "owns an interest in the land." This is no constraint at all. *See* n.8, *infra*.

The Petition also appears to rely upon the factors set out in 25 C.F.R. 151.10. This section simply lists the factors which the Secretary shall "consider" and does not set any limitations on the Secretary's authority. Thus, while the Secretary is to *consider* the "purposes" to which the land will be used, the regulation does not set any *limit* on

those purposes. As found by *Florida Dept. of Business Regulation*, 768 F.2d at 1256-1257:

> The regulation does not purport to state how the agency should balance these factors in a particular case, or what weight to assign to each factor. Nor does it mandate that the Secretary not acquire lands located in particular areas, or limit the size of acquisitions. The factors listed in the regulation are not the kind of legal principles courts are familiar with applying to a particular case.

Reinforcing the discretionary nature of the Secretary's decision are the provisions of 25 C.F.R. 1.2 which provide authority to the Secretary of Interior to "waive or make exceptions" to any provision of the pertinent chapter of the Code of Federal Regulations if the Secretary finds it is in the best interest of the Indians and would not violate any federal statute or the constitution. The Secretary thus in one broad regulation made the remainder of Chapter 1 of 25 C.F.R. (which includes 25 C.F.R. 151) discretionary. *See Florida Dept. of Business Regulation*, 768 F.2d at 1250; *Florida R.B.*, at 11-12. The Secretary on June 3, 1996, proposed a style and form change to 25 C.F.R. 1.2, but did *not* seek to alter its content. 61 Fed. Reg. 27,821 (June 3, 1996).

D. Remand of this Case to Allow the Losing Party, the United States, to Shift its Position so as to Bolster its Case on the Merits, Is Singularly Inappropriate.

The final argument of the government essentially asks this Court to surrender control of its docket to the Solicitor General by granting certiorari without considering the merits, vacating and remanding to the Administrator. This would give the government the opportunity to change the position on judicial review it has historically taken and which it successfully induced at least two courts of appeals to adopt. This unprecedented plea of the government should be rejected.

More specifically, the government argues that because "the court of appeals based its assumption of non-reviewability on the government's argument," Pet. at 24, and because the government, after suffering defeat on its petition for rehearing has "abandoned" that position, *id.*, and because the Secretary of the Interior has issued a new regulation, the matter should be remanded.

First, there are no grounds for remand simply because the United States wishes to abandon a position it successfully pursued at the court of appeals but which contributed to its ultimate defeat. The government cites no precedent for this striking position. Furthermore, the implicit argument of the government, i.e., that the court of appeals did not actually find that the matter was non-reviewable, is without merit. The court of appeals below clearly found that 25 U.S.C. § 465 created an "unrestrained power . . . free of judicial review." App. 14a. *See also, Id.* at 15a. *See* Argument B, *supra*. The real federal

complaint is that the discussion of the issue was not thorough enough for the United States, but this does not constitute grounds to grant certiorari. *Lawrence on behalf of Lawrence v. Chater*, ___ U.S. ___, 116 S.Ct. 604, 609 (1996). As we have noted above, for the United States to seek a remand is all the more striking because the decision of the court of appeals below on judicial review corresponds with the position the government has taken historically and in this very Court. *Florida R.B.*, pp. 10-12.

Furthermore, the regulation adopted by the Secretary on April 24, 1996, *see* App. 64a-69a, does not provide grounds for granting certiorari, vacating and remanding. (GVR). The purpose of the rule is to provide a "30-day waiting period after final administrative decisions to acquire land into trust." App. 64a. *See also Id.* at 68a-69a (text of new regulation). The rule is irrelevant to this proceeding because *it does not create any standards for determining if land should be taken into trust. Id.* The commentary to the rule asserts, in an *ipse dixit* and for the first time in the rule making process, that judicial review is available, App. 66a, but does not create enforceable standards. Providing time for an appeal without standards is irrelevant and indeed may properly be termed destructive. In *Amalgamated Meat Cutters and Butcher Workmen v. Connally*, 337 F.Supp. 737, 755 (D.D.C. 1971), the three-judge court said:

> If the courts are open only nominally, they would enhance rather than inhibit executive absolutism.

The government argues that it is appropriate to GVR in light of several cases it cites at Pet. at 25, n.14. The government's contention that these cases support this

action is groundless. *In each of the cited cases in which the government was a litigant, the government obtained the GVR it sought after it had been successful below. Here, the government lost.*[11]

That GVR should not be used to provide a losing party a "second chance" is clear. As Justice Scalia stated in dissent in *Stutson v. United States*, ___ U.S. ___, 116 S.Ct. 611, 615 (1996) (Scalia, J., dissenting):

> But the fact that the party who *won below* repudiates on certiorari its position on a particular point of law does not give rise to any "intervening," postjudgment factor that must be considered. (Emphasis added.)

It follows that the fact that a party who *lost below* repudiates its position on a particular point of law does not give rise to any "intervening" post-judgment factor that must be considered. No case cited has, in fact, suggested that GVR is a proper device to allow a litigant who *lost* to take a new position in this Court especially when the litigant has, on a prior occasion, successfully resisted certiorari using the now repudiated position. *See, Florida R.B.*, pp. 10-12.

This case thus falls clearly within the language of *Lawrence*, 116 S.Ct. at 607 which states:

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[11] In one of the cases, *City of Chicago v. Environmental Defense Fund*, ___ U.S. ___, 113 S.Ct. 486 (1992) GVR was granted to the benefit of a losing party on the basis of an EPA memorandum, but the EPA itself was not a litigant. In a second case, the United States had been partially successful below and appeared in this Court as a Respondent only, or, in other words, as a successful party. *Schmidt v. Espy*, ___ U.S. ___, 115 S.Ct. 43 (1994).

> Whether a GVR order is ultimately appropriate depends further on the equities of the case: if it appears that the intervening development, such as a confession of error in some but not in all aspects of the decision below, is part of an unfair or manipulative litigation strategy, or if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate.

The contention by the United States that a GVR is justified because, after rehearing in the Court of Appeals, it has changed its position, is the ultimate "unfair or manipulative litigation strategy." Allowing the United States to profit by this device will most certainly encourage the government "to take full advantage of the opportunity to wash out, on certiorari, disadvantageous positions it has embraced below; and we can expect it to focus less of its energy upon getting its positions 'right' in the Courts of Appeals." *Stutson*, 116 S.Ct. at 617 (Scalia, J., dissenting).

Finally, we note that even if a GVR might in some circumstances be available to a losing party, the government has failed to demonstrate that its last minute change of heart raises a "reasonable probability" that the court of appeals would change its decision; this further precludes the grant of a GVR here. *Lawrence*, 116 S.Ct. at 609.

This case squarely presents the constitutionality of 25 U.S.C. § 465. The case was decided by the Court of Appeals for the Eighth Circuit and the rehearing en banc

sought by the United States was denied. While we suggest that plenary review is not justified because the decision below was clearly correct and because of the lack of proven importance of this decision, we also stress that the use of the device of the GVR in this situation would effectively undermine the Court's control of its docket, place litigants other than the federal government in a perpetually compromised position, and encourage manipulative litigation techniques on the part of the federal government.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition For Writ Of Certiorari be denied.

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No. 95-1956

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
PETITIONERS

v.

STATE OF SOUTH DAKOTA AND CITY OF OACOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

In opposing our petition, respondents contend that (1) the constitutionality of Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. 465, lacks "national importance" (Br. in Opp. 10-11); (2) the court of appeals was not obligated to rule on non-constitutional issues before deciding the constitutional question (*id.* at 11-13); (3) the court's ruling on the constitutional issue is correct (*id.* at 13-22); and (4) it would be inappropriate to remand the case for consideration of recent regulatory developments that are pertinent to the Court's resolution of the constitutional issue (*id.* at 23-27). Those arguments are unpersuasive.

1. Respondents' contention (Br. in Opp. 10-11) that the issue presented by this case lacks "national importance" is without merit. A court of appeals' "exercise of the grave power of annulling an Act of Congress" is normally enough, by itself, to call for this Court's review. *United States* v. *Gainey*, 380 U.S. 63, 65 (1965). See, *e.g.*, Robert L. Stern et al., *Supreme Court Practice* 185 (7th ed. 1993). The court of appeals' decision here raises especially serious concerns because it invalidates a central provision of the IRA, which has been aptly described as one of Congress's most important enactments affecting Indian Tribes. See Pet. 15-17.

Respondents' assertions to the contrary are not well founded. They contend (Br. in Opp. 10) that two statements in the commentary to a recent regulation implementing Section 5 of the IRA indicate that the statute is unimportant. See Pet. App. 64a-69a; 61 Fed. Reg. 18,082 (1996). Respondents disregard the context and content of those statements. The first notes that the *regulation* will not have any detrimental federalism effects, Pet. App. 66a, while the second notes that the *regulation* does not qualify as a "major rule" for certain regulatory review purposes, see 5 U.S.C. 804, because the Tribes make only a limited number of requests each year to place lands in trust, Pet. App. 67a. Those statements, which are directed to certain discrete characteristics of the new regulation for other purposes, in no way undermine the importance of Section 5 itself.

As explained in the petition (and in the numerous briefs amici curiae supporting it), the Secretary of the Interior's administration of Section 5 has great practical significance for Indian Tribes throughout the Nation. As of the date the certiorari petition was

filed, there were 439 pending applications to the Secretary to acquire land in trust status, and the invalidation of Section 5 also potentially calls into question thousands of acquisitions (encompassing an estimated 9 million acres of land) made by the Secretary under Section 5 during the past 60 years. See Pet. 17. Those considerations, coupled with the crucial role that Section 5 plays within the statutory scheme of the IRA and within federal Indian law (see Pet. 15-16, 21-22), amply demonstrate the great practical significance of the decision below upon the Secretary's administration of the IRA.

Respondents are incorrect in asserting (Br. in Opp. 10) that the decision below is inconsequential because it does not prevent Tribes from acquiring lands in fee, without the protection that trust status affords. That contention ignores the central purpose of the IRA to restore the tribal land base and promote Indian self-government and economic self-sufficiency. See *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152 (1973); Pet. 3-5. Section 5 of the IRA allows Tribes to rebuild their tribal land base by acquiring lands and placing them in the same trust status that their lands enjoyed prior to implementation of the allotment policy. See Pet. 4-5; *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 255 (1992).[1]

---

[1] Even with the protections provided by the Secretary's holding of land in trust status for Indians and Indian Tribes, the alienation of Indian lands and diminution of the tribal land base continues. One group of Indian Tribes notes that "for the sixteen tribes with reservations in Nebraska, North Dakota and South Dakota * * * from 1985 to 1995, a total of 46,399 acres passed from trust to fee status while 18,120 acres were taken

There is also no merit to respondents' cavalier assertion that the matter "may easily be handled by Congress which merely is required to enact a constitutionally sufficient statute." Br. in Opp. 10. The same assertion might be made in many cases in which a lower court holds an Act of Congress unconstitutional. But this Court, consistent with the respect owed a coordinate Branch under the separation of powers, has consistently granted review in such cases. In any event, Congress should not be forced to enact new legislation replacing a frequently employed 60-year-old statute in response to a highly questionable ruling by a divided panel of a lower court. This Court has the overarching responsibility for determining conclusively whether Congress has overstepped constitutional limitations. It is particularly appropriate for this Court to resolve the constitutionality of Section 5 because the Court has previously applied that provision without any suggestion that it suffers from a constitutional infirmity. See *Mescalero Apache Tribe* v. *Jones*, *supra*.

2. Respondents are incorrect in their challenge (Br. in Opp. 11-13) to the United States' submission that the court of appeals prematurely reached the constitutional issue and departed from traditional jurisprudence governing constitutional adjudication. As we explain in the certiorari petition, the court of appeals improperly reached out to decide a constitutional issue without first resolving other non-

into trust." See Brief of Amici Curiae Assiniboine and Sioux Tribes of the Fort Peck Reservation, Cheyenne River Sioux Tribe, Confederated Tribes of the Colville Reservation, Ho-Chunk Nation, Fond Du Lac Band of Lake Superior Chippewa, Puyallup Tribe, St. Croix Band of Chippewa Indians, and Standing Rock Sioux Tribe in Support of Petitioners at 3 n.2.

constitutional issues that might have obviated the need for a constitutional ruling. Pet. 18-19. Furthermore, it improperly based its analysis on hypothetical circumstances unrelated to the facts of this case or to the Secretary's history of implementing the IRA. See Pet. 20.

Respondents' assertion that the court of appeals actually resolved the non-statutory issues is simply wrong. Respondents contend that the court of appeals "clearly indicated that it did not believe that the Quiet Title Act precluded judicial review." Brief in Opp. 11. The court expressly said, however, that "we need not decide th[at] issue." Pet. App. 4a n.1. Respondents also assert that the court "determined that judicial review was unavailable because the matter was committed to the discretion of the agency," Br. in Opp. 12, but they can point to no square holding to that effect, *ibid.* To the contrary, as Judge Murphy stated in dissent:

> The court suggests, but does not decide, that the district court had jurisdiction to consider the claims brought under the [Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq*]. If so, the principle of judicial restraint should lead to consideration of those claims prior to reaching any constitutional issue. Resolution of the constitutional question would not be required if the merits of the APA claims were to be determined in favor of the [respondents].

Pet. App. 16a. Judge Murphy correctly noted that, even if the respondents' APA claims were rejected, that analysis would inform the constitutional inquiry. *Id.* at 17a.

As Justice Frankfurter stated, "[t]he 'great gravity and delicacy' of this Court's function in passing upon the validity of an act of Congress is called into action only when absolutely necessary," and "[i]t should not be exercised on the basis of imaginary and non-existent facts." *United States* v. *Lovett*, 328 U.S. 303, 329 (1946) (Frankfurter, J., concurring). Furthermore, "the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Ibid.* (Frankfurter, J., concurring). The court of appeals ignored those important principles. See Pet. 18-20.

3. Respondents argue at length (Br. in Opp. 13-22) that the court of appeals was correct in holding Section 5 unconstitutional. We have pointed out in the petition (at 20-23) the fundamental deficiencies in the Eighth Circuit's application of the non-delegation doctrine, and there will be time enough to answer respondents' other contentions in a brief on the merits if this Court grants plenary review. The question at this juncture is whether the Court should grant the petition. In that regard, we note an important consideration, recently reiterated by the Court in *Loving* v. *United States*, 116 S. Ct. 1737 (1996).

The Court ruled in *Loving* that Congress had lawfully authorized the President to promulgate aggravating factors in military capital murder cases. See 116 S. Ct. at 1751. It explained that Congress must be permitted to assign to the Executive Branch "some authority that it could exercise itself," because "[t]o burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a

workable National Government." *Id.* at 1744. The Court specifically noted:

> Though in 1935 we struck down two delegations for lack of an intelligible principle, *A.L.A. Schecter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), and *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), we have since upheld, without exception, delegations under standards phrased in sweeping terms. See, e.g., *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943) (upholding delegation to the Federal Communications Commission to regulate radio broadcasting according to "public interest, convenience, or necessity").

Id. at 1750. The Court's decision in *Loving* underscores the extraordinary nature of the court of appeals' ruling in this case. That ruling is inconsistent with an unbroken string of this Court's decisions spanning more than 50 years. See Pet. 20-21.

4. If this Court decides to grant the petition, then it should consider whether summary action may be appropriate in this case. Respondents oppose (Br. in Opp. 23-27) the United States' suggestion that the Court should vacate the decision and remand the case to the Secretary. Contrary to respondents' assertions (*id.* at 23), the United States has made that suggestion out of respect for, rather than in derogation of, the Court's interest in managing its docket. See Pet. 23-26.

We have explained in the petition and herein that the court of appeals invalidated Section 5 of the IRA on non-delegation grounds without resolving whether Congress has provided for judicial review of the Secretary's decisions under that provision. As Judge Murphy explained, Pet. App. 16a-17a, the availability

of judicial review can be an important factor in the non-delegation inquiry. See Pet. 23-24. The Secretary of the Interior has now taken the position, through the issuance of regulations facilitating judicial review, that review is available under the APA of the Secretary's decision to acquire trust lands before the United States actually obtains title. See Pet. App. 64a-69a. It is therefore appropriate to remand the case for reconsideration in light of that development, which may obviate the need for this Court's review. See Pet. 25-26.

As we explain in the petition, the Secretary of the Interior's regulation departs from and supersedes the position taken by the United States in litigation in the lower courts. See Pet. 24. But contrary to respondents' argument (Br. in Opp. 23-24, 26), it does not reflect an "unfair or manipulative litigation strategy." Quite the contrary, the government's change in position stems from its continuing obligation to reexamine, at all stages of the litigation, whether the government's legal positions are appropriate in light of the evolution of the controlling legal principles and the government's experience in administering the statute. See, *e.g.*, *Smiley* v. *Citibank (South Dakota), N.A.*, 116 S. Ct. 1730, 1733 (1996) (according deference under *Chevron* to a regulation prompted by the litigation of the underlying suit).[2]

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[2] Respondents make much of the fact that the United States had advocated its now superseded position in its brief in opposition in *Florida Dep't of Business Regulation* v. *United States Dep't of Interior*, cert. denied, 475 U.S. 1011 (1986). Since that time, however, this Court has refined the scope of the exception to judicial review provided in 5 U.S.C. 701(a)(2). See, *e.g.*, *Lincoln* v. *Vigil*, 508 U.S. 182, 190-193 (1993). It is not "unfair" or "manipulative" for the government to reconsider its position on a continuing basis in light of this Court's rulings and other developments.

The federal government does not suggest a GVR to gain a tactical advantage.[3] Instead, the United States suggests that course because it would result in the most efficient use of the Court's limited resources. The remand that we propose would allow the parties to put forward a full exposition of the relevant facts. Respondents then would have an opportunity to seek judicial review based on objections made part of the administrative record. A remand to the Secretary also would ensure that respondents can obtain full judicial review of their statutory and constitutional objections to the trust acquisition. See Pet. 26 n.16. This Court would then be able, if necessary, to review any pertinent issues on the basis of a full record and a full consideration of all relevant legal issues by both courts below.

* * * * *

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[3] Indeed, the Lower Brule Tribe, which requested the trust acquisition that respondents challenge in this case, as well as other Indian-Tribe amici, join respondents in opposing our suggestion of a remand to the Secretary. See Brief for Lower Brule Sioux Tribe as Amicus Curiae in Support of Petition for a Writ of Certiorari at 10-15; and Brief for Amici Curiae Shakopee Mdewakanton Sioux (Dakota) Community, Upper Sioux Community, Grand Portage Band of Chippewa Indians, Red Lake Band of Chippewa Indians, and Sisseton-Wahpeton Sioux Tribe in Support of Petition for Writ of Certiorari at 17-18.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted. The judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals with instructions to vacate the judgment of the district court and remand the matter to the Secretary of the Interior for reconsideration. In the alternative, the Court should grant plenary review.

Respectfully submitted.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF AMICI CURIAE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, THE MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, THE MENOMINEE INDIAN TRIBE OF WISCONSIN, THE SEMINOLE TRIBE OF FLORIDA, THE NARRAGANSETT INDIAN TRIBE AND THE ST. REGIS MOHAWK TRIBE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI

Amici are all federally-recognized Indian tribes organized under Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476. All *amici* but the Menominee Tribe of Wisconsin and the St. Regis Mohawk Tribe are the beneficial owners of lands held in trust by the United States pursuant to Section 5 of the Indian Reorganization Act. All *amici* are interested in future acquisitions of trust lands under that section, and some are now actively pursuing such acquisitions.

The Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota lost hundreds of thousands of acres of reservation lands as the result of allotment-era acts authorizing the Secretary to sell "surplus lands" in the Reservation to non-Indian homesteaders, and to allot lands within the Reservation to tribal members. *See New Town v. United States*, 454 F.2d 121, 127 (8th Cir. 1972); *Duncan Energy v. The Three Affiliated Tribes*, 27 F.3d 1294 at 1296-98 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 779 (1995). The Three Affiliated Tribes has a policy of reacquiring lands held in fee within the reservation boundaries and converting these lands to trust status. Thousands of acres of lands have been acquired in trust by the United States on behalf of the Tribe under Section 5 of the Indian Reorganization Act. In addition, *most* tribal members had their trust allotments taken from them as the result of construction of the Garrison Dam in the 1950s, thus necessitating the purchase of other trust lands for them elsewhere.

The Miccosukee Tribe of Indians of Florida has a reservation in the Florida Everglades. While this land is home to the Tribe and its members, it is of limited use for economic development due to strict land use restrictions in the Everglades. The United States has acquired various off-reservation parcels in trust for the Miccosukee Tribe of Indians of Florida for economic development, and the Tribe is currently actively pursuing having additional parcels acquired in trust by the United States.

The Menominee Tribe of Wisconsin has a reservation of over 200,000 acres which is largely forested and comprises the Tribe's valuable forest asset. Very little acreage is available for economic development or other use. The Tribe is considering a request that the Secretary acquire a number of parcels of land in trust for the Tribe under Section 5 of the Indian Reorganization Act.

The Seminole Tribe of Florida also has a land base in the Everglades. It has acquired thousands of acres of

land through the private purchase and subsequent transfer of that land to the United States to be held in trust for the Tribe pursuant to Section 5. The Tribe has pending a request that approximately sixty acres be placed in trust status for the benefit of the Tribe.

The Narragansett Indian Tribe's 1800-acre reservation in the State of Rhode Island is held in trust by the United States pursuant to Section 5 of the Indian Reorganization Act. The Tribe also has pending a request that additional land be acquired for it pursuant to Section 5. Denial of that request would jeopardize the planned construction of 50 low-income houses for tribal members, since the Department of Housing and Urban Development requires that the land on which the houses are to be built be transferred into trust for the Tribe pursuant to Section 5.

The St. Regis Mohawk Tribe has a small reservation in upstate New York which was reduced to its current size by action of the state of New York many years ago. The Tribe is currently pursuing having additional land acquired in trust by the United States for the benefit of the Tribe.

SUMMARY OF ARGUMENT

Amici Indian tribes submit this brief in support of the Federal petitioners for a writ of certiorari. The Eighth Circuit has ruled that Section 5 of the Indian Reorganization Act of June 14, 1934, 25 U.S.C. § 465, which authorizes the United States Secretary of the Interior ("Secretary") to acquire lands to be held in trust for Indian tribes and individual Indians, is an unconstitutional delegation of legislative power to the Secretary. The Eighth Circuit erred in this ruling and did so by reaching the constitutional issue without first deciding the non-constitutional issue of whether the plaintiffs were entitled to the hearing they sought challenging the acquisition at issue here under the Administrative Procedures Act, 5 U.S.C. §§ 701-706. By declaring Section 465 unconstitutional, the Eighth Circuit has cast doubt upon the status of mil-

lions of acres of land acquired by the Secretary in trust on behalf of Indian Tribes over the last 60 years. Amici support the position of the federal petitioners that this Court must act either by vacating both the decision of the Eighth Circuit and the District Court and remanding the case to the Secretary for reconsideration and the entry of a new administrative decision or by granting review of the Eighth Circuit's erroneous ruling. Amici have requested the permission of the parties to file this brief and they have consented.

ARGUMENT

I. THE CONSTITUTIONALITY OF SECTION 5 OF THE INDIAN REORGANIZATION ACT AFFECTS THE STATUS OF ALL INDIAN LAND TAKEN INTO TRUST IN THE LAST 60 YEARS

The Eighth Circuit's decision holds unconstitutional a statute under which land has been acquired for the economic, political, and social development of Indian tribes and individual Indians for over 60 years. As stated by Judge Murphy in his dissent from the Eighth Circuit's decision:

> "The court invalidates today a congressional enactment designed to acquire land in trust for Indians that has been in place for over sixty years and, in the process, places in doubt the status of all Indian trust land." App. 15a[1] (Murphy, J., dissenting).

Because the parcel involved in this case had already been acquired in trust prior to the decision, *see* App. 3a, the decision calls into question the status of all lands acquired in trust under Section 5 in the past 60 years and thousands of acres of land that have been taken into trust for the six *amici* tribes.[2] The decision raises important

[1] References are to Appendix A filed by Petitioners.

[2] Section 5 of the Indian Reorganization Act applies on its face only to tribes who voted to organize under that act, but Section 203 of the Indian Land Consolidation Act, 25 U.S.C. § 2202, extended Section 5 to tribes not organized under the Indian Reorganization Act. Thus, all federally recognized tribes would be affected by the lower court's ruling.

and disturbing questions as to the status of those lands. If the Secretary had no power to acquire these lands, are the acquisitions void? If so, who owns the lands, the tribe or Indians for whom the lands were acquired in trust, or the transferor or his heirs?[3] If the lands taken into trust over the past sixty years remain in Indian hands, but lose their trust status, they may be subject to state property taxes which would place a severe economic burden on the tribes and Indians and could result in additional losses of tribal and Indian land. *See, County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992) (county could impose property taxes on land patented in fee, within the reservation, and owned by reservation Indians or the Yakima Nation).

The Eighth Circuit's decision thus raises the specter that tribes and Indians could lose the lands they have acquired under Section 5 of the Indian Reorganization Act. This would tragically undermine one of the principal goals of the Indian Reorganization Act, the acquisition of lands for the Indians to make up for the loss of 90 million acres of Indian lands (or about two-thirds of their lands) as a result of the allotment policy. *See County of Yakima v. Yakima Nation*, 502 U.S. at 276; App. 22a (Murphy, J., dissenting).

The Eighth Circuit's decision will also have a prohibitive effect on future acquisitions of lands for tribes and individual Indians, and thwart the development of reservation economies, and tribal self-determination. Should this decision stand, tribes will lose more than land base. The lower court's decision will adversely impact the future economic growth and development of the Indian tribes by placing tribal lands in the same precarious posi-

[3] In some acquisitions of trust property, the tribe first buys the property in fee and then transfers it to the United States to be held in trust. In others, the United States acquires the property from a third party for the tribe.

tion that they were in before the enactment of the Indian Reorganization Act.

Because of the potential disastrous effect the decision will have on literally millions of acres acquired pursuant to the Indian Reorganization Act and held in trust for Indians, this Court must take action as requested by the United States either by vacating and remanding to the Secretary for further consideration or by granting plenary review.

II. THE LOWER COURT ERRED IN REACHING THE CONSTITUTIONAL ISSUE WITHOUT FIRST RESOLVING THE ADMINISTRATIVE PROCEDURES ACT ISSUE

As the dissenting opinion of Judge Murphy notes, it is a "fundamental rule of judicial restraint" that constitutional issues should not be reached unless necessary to a decision. App. 16a (Murphy, J., dissenting) (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 157 (1984)). In this case, plaintiffs sought review under the Administrative Procedures Act, 5 U.S.C. §§ 701-706 ("APA"), of the Secretary's decision to acquire the lands in trust. The district court dismissed the case, ruling that it had no jurisdiction to review plaintiffs' APA claims because the Quiet Title Act, 28 U.S.C. § 2409a, which permits the United States to be sued to resolve real property disputes, does not apply to trust lands. Although the "primary focus" of this appeal was the district court's dismissal of plaintiffs' APA claims, App. 15a (Murphy, J., dissenting), the lower court did not decide this nonconstitutional issue, but instead unnecessarily reached the constitutional issue in violation of the "fundamental rule of judicial restraint."

The lower court's failure to consider the availability of APA review of the Secretary's decision was particularly egregious here because "resolution of the APA inquiry could inform the analysis of the delegation issue since the availability of judicial review of an agency action is relevant in determining whether the authorizing statute is a lawful delegation." App. 17a (Murphy, J., dissenting) (citing *United States v. Garfinkel*, 29 F.3d 451, 459 (8th Cir. 1944)). As Judge Murphy further stated:

> The availability of judicial review of the Secretary's actions may also serve to limit the delegation here. *See Garfinkel*, 29 F.3d at 459. Judicial review 'is a factor weighing in favor of upholding a statute against a non-delegation challenge.' *Id.* App. 229.

While the majority below recognized this principle, instead of deciding the issue, it relied on the Secretary's mere assertion that his decision is unreviewable. App. 6a. In so ruling, the lower court erred. Before reaching the question of whether Section 5 of the Indian Reorganization Act is constitutional, the Court must first decide whether the APA allows for review of a Secretarial decision to take land into trust pursuant to the Indian Reorganization Act.

There are three additional reasons why the Court should have first reached the issue of reviewability of the Secretary's decision under the APA. First, as noted above, a decision invalidating Section 5 of the Indian Reorganization Act would have a grave impact on the status of millions of acres of Indian trust lands and would prevent future acquisition of lands for the tribes. The Court should seek to avoid such an unnecessary impact.

Secondly, the decision invalidates the IRA under the nondelegation doctrine, a virtually defunct doctrine under which no federal legislation has been struck down for over sixty years. As Judge Murphy stated, "Only twice in its history, and not since 1935, has the Supreme Court invalidated a statute on the ground of excessive delegation of legislative authority." App. 18a (Murphy, J., dissenting). The Court should not strain to hold a statute un-

constitutional under a doctrine of questionable viability when a non-constitutional basis for a decision may exist.

Finally, and perhaps most importantly, the Secretary has now explicitly provided for judicial review of his decisions to take land into trust. Since the decision below was premised on the lack of judicial review, the decision's future application is limited. But this still leaves all trust acquisitions prior to the new Secretarial regulation in doubt. The best way to remedy this problem is to vacate both decisions below and remand the case to the Secretary for further consideration and decision.

CONCLUSION

For the forgoing reasons, the Court should grant the petition for writ of certiorari or in the alternative, vacate the decisions below and remand the matter to the Secretary for further proceedings.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., PETITIONERS,

v.

STATE OF SOUTH DAKOTA AND CITY OF OACOMA, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR LOWER BRULE SIOUX TRIBE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I

QUESTION PRESENTED

Whether Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, which authorizes the Secretary of the Interior to acquire interests in real property "for the purpose of providing land for Indians," is an unconstitutional delegation of legislative authority.

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BRIEF FOR LOWER BRULE SIOUX TRIBE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE LOWER BRULE SIOUX TRIBE

The United States Court of Appeals for the Eighth Circuit has declared 25 U.S.C. § 465 to be "an unconstitutional delegation of legislative power." Pet. App. 2a. The case was reported as *South Dakota v. United States Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995). A panel of the Eighth Circuit concluded that Congress violated the "nondelegation doctrine." Under United States Constitution Article I, § 1, all legislative powers are vested in the Congress. The court held that, when

Congress enacted § 465 in 1934, Congress violated this constitutional provision by failing to provide adequate standards to govern the Secretary of Interior's (hereinafter "Secretary") implementation of the statute. Pet. App. 9a-13a. Section 465 authorizes the Secretary "in his discretion" to acquire land for Indian tribes.

Amicus Curiae, the Lower Brule Sioux Tribe, is and at all times has been a sovereign American Indian tribe, which has entered into numerous treaties with the United States. It has been a federally-recognized Indian tribe, and is a constituent band of the Great Sioux Nation. It is located in the State of South Dakota at Lower Brule.

The land at issue was purchased by the Lower Brule Sioux Tribe on or about March 13, 1990. The land, part of which is within the municipal limits of Oacoma, South Dakota, consists of approximately 91 acres and is located about seven miles south of the current boundary of the Lower Brule Sioux Tribe Reservation. The Lower Brule Sioux Tribe subsequently requested that the Secretary acquire this land in trust status for the Tribe. Pet. App. 32a. On November 30, 1992, the Secretary acquired title to the land. Pet. App. 40a. That acquisition is the subject of this lawsuit, filed by the State of South Dakota and the City of Oacoma (hereinafter "respondents"), that spawned the certiorari petition the Solicitor General filed.

The Lower Brule Sioux Tribe was not a party below. However, on December 20, 1995, the Lower Brule Sioux Tribe filed a "Statement" with the Eighth Circuit supporting the Secretary's position that the court should vacate its ruling declaring 25 U.S.C. § 465 to be unconstitutional.

Obviously, the Lower Brule Sioux Tribe has a keen and, indeed, unique interest in the disposition of this case. The decision directly impacts the 91 acres of land that are the subject of this litigation. Approximately 110,000 other acres of land that the federal government holds in trust for the Lower Brule Sioux Tribe will likely also be impacted. Indeed, immediately after the Eighth Circuit's ruling, the Lyman (South Dakota) County Treasurer sent "past due" notices to the Lower Brule Sioux Tribe, seeking payment of taxes for lands that the United States holds in trust for the Tribe.

In accordance with Supreme Court Rule 37, the Lower Brule Sioux Tribe has sought and obtained written consent to file this Brief from the Department of the Interior, the State of South Dakota, and the City of Oacoma. The Tribe has filed the originals of these letters with the Clerk.

STATEMENT

1. The Lower Brule Sioux Reservation and the Reservation's boundaries were created by Congress in 1889. Act of March 2, 1889, ch. 405, 25 Stat. 888. The 91 acres of land at issue were in 1890 the location of the first Lower Brule Agency of the Lower Brule Sioux Tribe. Herbert T. Hoover, *Wildlife on the Cheyenne River and Lower Brule Sioux Reservations: A History of Use and Jurisdiction* 90 (1992). The Lower Brule Agency remained on the land through 1893, and then was moved by the federal government closer to the center of the Tribe's property. *Id.* at 91.

Primarily because of the federal policies mandated in the Indian General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388, the Tribe lost ownership of the land in 1893, even though it was within the Tribe's historical land base. The

Dawes Act led to a massive transfer of ownership of tribal lands to non-tribal persons. This proved disastrous for the tribes and their members, and severely damaged the stability of many tribal communities. *Hodel v. Irving*, 481 U.S. 704, 707 (1987).

The allotment program was terminated in 1934 by the Indian Reorganization (Wheeler-Howard) Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479) (hereinafter "IRA"). Congress therein addressed the precipitous and catastrophic loss of tribal lands resulting from the Dawes Act. Specifically, Congress prohibited the Secretary from allotting any further lands to tribal members. 25 U.S.C. § 461. In addition, in 25 U.S.C. § 465, Congress authorized the Secretary to begin purchasing land for tribes to help restore what they had lost:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands . . . within or without existing reservations, including trust . . . allotments . . . for the purpose of providing land for Indians.
>
> * * * * *
>
> Title to any lands or rights acquired . . . shall be taken in the name of the United States in trust for the Indian tribe . . . and such lands or rights shall be exempt from State and local taxation.

In enacting the IRA, Congress sought to give Indian tribes a chance to develop the initiative destroyed by a century of oppression and paternalism. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973). Congress sought to halt the loss of Indian lands that had occurred under the allotment

statutes. *Chase v. McMasters*, 573 F.2d 1011, 1016 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978). Under § 465, funds are appropriated, except that Congress has precluded use of the funds to acquire land relating to certain Navajo reservations.[1]

In 1934, the Lower Brule Sioux Tribe was incorporated pursuant to the IRA. Act of June 18, 1934, ch. 576, 48 Stat. 984. In 1935, the Tribe's constitution was approved by the Secretary of Interior. Felix S. Cohen, *Handbook of Federal Indian Law* 470 (1986).

The Lower Brule Sioux Tribe Reservation currently encompasses approximately 236,000 acres of land, of which approximately one-half is owned for Tribal use. Approximately 110,000 of these acres are owned by the federal government in trust for the Tribe. The Reservation consisted of approximately 447,000 acres until the allotment process established by the Dawes Act and other federal programs reduced the acreage to its current size. *Lower Brule Sioux Tribe v. South Dakota*, 917 F. Supp. 1434, 1441 (D.S.D. 1996).

2. Consistent with the purposes of § 465, in 1990 the Lower Brule Sioux Tribe purchased the 91 acres of land. Thereafter, in March 1990, the Tribe submitted an application under 25 U.S.C. § 465, asking the Secretary to acquire the land in trust status for the Tribe. The Lower Brule Sioux Tribe explained the purposes for which the land would be used, including creating an industrial park, enticing businesses to

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[1] In *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992) (citing 25 U.S.C. § 465), the Court discussed how passage of the IRA returned Indian tribes to a principle of tribal self-determination and self-governance, restored unallotted Indian lands to tribal ownership, and authorized the federal government to acquire, on behalf of the tribes, lands within or outside existing reservations.

relocate, providing preferential employment opportunities for Indians, and providing increased economic benefits to nearby reservations and counties. Pet. App. 38a.

The Secretary sent letters to the respondents, inviting them to submit comments. Pet. App. 32a. Both the state and city filed comments on April 26, 1990. Pet. App. 32a-34a. On June 29, 1990, the Lower Brule Sioux Tribe refuted the concerns that had been raised by the respondents. Pet. App. 38a-40a. On November 30, 1992, the Secretary took title to the land in trust for the Tribe. Pet. App. 40a.

3. In July 1992, the respondents filed this action in South Dakota against the United States Department of the Interior and certain of its officials (collectively "Interior"), seeking judicial review under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* Pet. App. 2a. Respondents also asserted that 25 U.S.C. § 465 was unconstitutional. Pet. App. 3a. However, before the land was acquired in trust by the Secretary, respondents did not seek relief from the court to block the proposed acquisition. On April 1, 1994, the district court (Battey, C.J.) granted Interior's Motion to Dismiss, concluding that the United States had not waived sovereign immunity, and that the statute was constitutional. Pet. App. 31a-52a. The court discussed in detail how various offices of Interior had supported or approved the Tribe's request to the Secretary to acquire the land. Pet. App. 37a-40a.

4. The respondents appealed that ruling to the Eighth Circuit. After briefing and oral argument, the court declared

25 U.S.C. § 465 unconstitutional.[2] Pet. App. 1a-30a. Judges Loken and Magill held that § 465 does not set perceptible boundaries or intelligible principles within the "four corners" of the statutory language, to constrain the Secretary's authority. Pet. App. 7a. The court concluded that Congress failed to articulate the public use that justifies an acquisition. Pet. App. 9a. Curiously, the panel admitted that the legislative history of § 465 suggests Congress did not intend to delegate unrestricted power to acquire land for Indians. *Id.* The panel also concluded that the Secretary's regulations, 25 C.F.R. Part 151, do not place restrictions on the purposes for which land may be placed in trust. Pet. App. 11a.

Judge Murphy dissented. She concluded (correctly in our view) that the majority's decision, overturning a statute that has been in place for over sixty years, places in doubt "the status of all Indian trust land." Pet. App. 15a. She went on to find that the IRA does not convey unbridled discretion to the Secretary, even though the Act gives the Secretary broad discretion to acquire land. Pet. App. 21a. She noted that the statute directs that land must be acquired for Indians only. *Id.* She also concluded that the Secretary's authority is limited by the statute's legislative history. Pet. App. 22a. Judge Murphy nevertheless agreed that the lower court's decision was in error. Judge Murphy would have remanded the case for a ruling by the district court on the merits of respondents' APA challenge to the acquisition. Pet. App. 26a-27a.

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[2] Remarkably, the respondents only touched on the constitutional issue in passing as the last of four issues in their brief. We understand that the oral argument did not address the constitutional question that the court later decided.

5. Interior timely sought a rehearing and suggested a rehearing en banc. Pet. 63a. On February 2, 1996, the Eighth Circuit denied the petition and the suggestion for rehearing en banc, even though four judges voted to grant the suggestion for rehearing en banc. *Id.*

DISCUSSION

1. We recognize that the Court will grant a petition for certiorari "only for compelling reasons." Sup. Ct. R. 10. However, when a court holds a federal statute unconstitutional, certiorari is usually granted because of the obvious importance of the case. *United States v. Gainey*, 380 U.S. 63, 65 (1965).

The failure to grant certiorari will have dramatic and far-reaching consequences for the Lower Brule Sioux Tribe, other tribes, and indeed, the Secretary. Pending final resolution of this case, the land at issue continues to be owned in trust by the United States. A decision to deny the petition for certiorari would mean that the government's acquisition of the land for the Lower Brule Sioux Tribe would apparently be void.

More generally, the Eighth Circuit's decision seriously threatens the authority of the Secretary in his trustee capacity to protect and restore the Tribe's interest in land to which the Tribe has had a historical nexus. The decision also potentially clouds the title to millions of acres of land owned by other tribes throughout the United States.

The legal and practical consequences of a denial of the petition for certiorari include:

(i) That the intent of Congress in enacting the IRA -- to repeal the General Allotment Act and use

the Secretary's special expertise to redress disastrous policies that had stripped tribes of their land base -- will be upended, frustrating tribal acquisition of land and accelerating the stripping of the historical land base of tribes;

(ii) That the state, county, and local taxation and assessment of tribal land will potentially destroy that tribal land base -- particularly in light of the historical relegation to tribes of the least economically-productive land;

(iii) That expenditure of limited tribal funds to pay taxation of tribal land will mean funds cannot be spent for other tribal purposes, thereby hastening the impoverishment of Indian tribes;

(iv) That ongoing or final prosecutions of persons who committed crimes on federal lands could be jeopardized. See, *e.g.*, 18 U.S.C. §§ 1852, 1855;

(v) That imposition of state laws into areas of exclusive tribal and federal jurisdiction, will unavoidably encroach upon tribal self-government and internal tribal relations; and

(vi) That nationwide clouds upon land titles will result relative to lands acquired under the IRA.

Thus, title to land acquired by the Secretary for all tribes would be called into question if the Court denies the petition for certiorari. The forum for this uncertainty would be in the courts and with the Secretary. States, local governments,

and others would seize upon the finality of the Eighth Circuit's decision as a means to challenge retroactively already completed acquisitions by the Secretary. Moreover, these same entities would undoubtedly use the decision as a strong precedent to challenge future acquisitions under § 465.

Actions taken by the Secretary under § 465 are not the only decisions called into question by the Eighth Circuit's decision. Congress has repeatedly used broad language in other statutory provisions relating to federal acquisitions of lands for tribes. See 25 U.S.C. §§ 450h(a)(3), 489, 1466, 1495, and 2209. While Congress' employment of similar broad language raises a concern as to whether these provisions too are subject to constitutional challenge, we submit that Congress' repeated usage of a similar statutory scheme supports the conclusion that Congress has consistently given the Secretary broad (but not unconstitutional) discretion when acquiring land in trust for tribes. Indeed, the fact that these statutes (including § 465) are limited to assisting Indians and Indian tribes distinguishes this case from court rulings which have adopted, or given serious consideration to, "nondelegation" constitutional challenges.[3]

2. Interior has urged the Court to grant the petition for a writ of certiorari, vacate the Eighth Circuit's Judgment, and remand the case. Interior asks this Court to instruct the Eighth Circuit to vacate the district court's Judgment and remand the

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[3] The constitutionality of statutes enforced by other federal agencies may also be challenged if the Eighth Circuit's decision is not reviewed. That decision was based on statutory language that allows Interior "in its discretion" to acquire land. To the extent this statutory language formed a basis for the result reached, the word "discretion" or "discretionary" appears in over five thousand sections of the United States Code. Many of these code sections, like 25 U.S.C. § 465, represent Congressional delegations of authority to federal executive officials or agencies.

matter to the Secretary for reconsideration of his decision to acquire the land for the Lower Brule Sioux Tribe. Pet. 15, 23-27. Interior asserts that the Secretary can decide again whether to acquire the land that is now at issue, and, pursuant to the Secretary's 1996 regulations (Pet. App. 68a-69a), respondents can thereafter file a second lawsuit if the Secretary decides to reacquire the land in trust.

The Lower Brule Sioux Tribe agrees that the Court should grant the petition for a writ of certiorari and vacate the Eighth Circuit's Judgment. We also agree that the case should be remanded to the Eighth Circuit without plenary briefing and argument. However, we submit that the Court should not direct the Eighth Circuit to remand the case to the Secretary. No further decision by the Secretary is required or appropriate. Instead, the Eighth Circuit should be permitted to consider the nonconstitutional issues that it did not address.

In their appeal to the Eighth Circuit, respondents raised a plethora of arguments challenging the district court's dismissal of their action. Respondents argued: (1) the Quiet Title Act, 28 U.S.C. § 2409a, does not prohibit judicial review of the Secretary's decision to acquire the land in trust; (2) sovereign immunity does not otherwise insulate the Secretary's decision from a judicial challenge; (3) the Assistant Secretary for Indian Affairs lacked authority to acquire the land, on a number of grounds including that he allegedly ignored the purpose for which the land was taken into trust, failed properly to consult with governmental entities before taking the land into trust, accepted a submission from the Lower Brule Sioux Tribe that was inadequate, failed to demonstrate that acquiring the land in trust was essential for the planned use of the property, and did not consider local zoning codes; (4) the Secretary's decision violated the APA, because

the Secretary excluded evidence from the administrative record; and (5) 25 U.S.C. § 465 is unconstitutional. The Eighth Circuit ruled only on the constitutional issue. Pet. App. 16a.

In reaching the constitutionality of § 465, the Eighth Circuit violated a "fundamental rule of judicial restraint." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 467 U.S. 138, 157 (1984). The Eighth Circuit should not have considered constitutional arguments relating to § 465 before it attempted to resolve the statutory issues raised by the respondents. *Jean v. Nelson*, 472 U.S. 846, 854 (1985) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable" (citation omitted)).

The Eighth Circuit did not even attempt to evaluate, for example, whether the Secretary's decision to take land into trust is reviewable under the APA, and, if it is reviewable, whether the Secretary's decision was arbitrary and capricious, or an abuse of agency discretion.[4] The court should have addressed the potentially dispositive statutory issues first. Furthermore, as Judge Murphy pointed out, if consideration of constitutional issues ultimately were to become necessary, resolution of the APA reviewability issue would help provide an informed constitutional analysis of § 465. Pet. App. 17a.

Thus, if as we believe is proper, the Court vacates the Eighth Circuit's Judgment because that court improperly

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[4] The Eighth Circuit indicated that APA review likely *would* be available in this case. Pet. App. 4a n.1. The 1996 regulations (Pet. App. 68a-69a) reflect the Secretary's current position that APA review of a proposed acquisition does lie in federal district courts.

reached a constitutional issue, there remain numerous nonconstitutional issues. Previously, where the Court has ruled that a lower court improperly reached a constitutional issue, the Court has typically vacated the Judgment of the lower court and remanded the case for a lower court to consider nonconstitutional issues. *Jean v. Nelson*, 472 U.S. at 857; *Escambia County, Fla. v. McMillan*, 466 U.S. 48 (1984).

Similarly, when a federal agency has altered its legal position when a case reaches the Court, the Court has remanded the case to a lower court for a ruling, rather than directing that court to remand the matter to the agency. *Lawrence ex rel. Lawrence v. Chater*, 116 S. Ct. 604, 606 (1996) (Court did not grant Solicitor General's suggestion that the Court remand to the Social Security Administration). See also *Jean*, 472 U.S. at 857. Interior does not suggest any sound reason why the Court's normal procedures should be disregarded if the Court vacates the Eighth Circuit's Judgment.

Interior urges that remand to the Secretary for a new decision will somehow obviate a court deciding whether the Quiet Title Act precludes judicial review of a decision by the Secretary to acquire land in trust. Pet. 26 n.16. We respectfully disagree. First, we see no reason why this Court should embroil itself in the question of whether a lower court should decide a nonconstitutional issue earlier raised by respondents. Second, even if it were appropriate for the Court to assist the Eighth Circuit to avoid an interpretation of the Quiet Title Act, we fail to see how Interior's suggestion will solve the problem.

If the Secretary were to abandon ownership of the land at issue, and thereafter issue a new decision which reaffirms the 1992 decision to acquire the land in trust, respondents will be

obligated, under the Secretary's 1996 regulations, to file suit *before* the land is taken in trust. 61 Fed. Reg. 18,082 (1996) (to be codified at 25 C.F.R. § 151.12), *reprinted at* Pet. App. 68a-69a. Respondents would surely both file suit *and* seek an immediate injunction from the court. Absent an immediate injunction, the Secretary could acquire the land, which would, in the Secretary's view, moot the case. The Secretary believes that once land is acquired in trust pursuant to § 465, the Quiet Title Act bars a further challenge to the Secretary's decision. Pet. App. 65a. Thus, in weighing whether to issue the injunction to avoid a mootness argument, the district court will almost certainly have to determine if the Quiet Title Act would apply.

To the extent Interior is suggesting that a new decision is needed to address the regulations in place when the Secretary acquired the land in 1992, Interior does not identify why the agency's earlier decision was deficient. The Eighth Circuit is fully capable of addressing the adequacy of that decision, to the extent that respondents earlier challenged the decision in their briefs filed with that court.

In 1995, after the acquisition of the land at issue, the Secretary revised the regulations to identify additional factors to be considered in acquisitions of land in trust by the Secretary. See 60 Fed. Reg. 32,874 (1995) (to be codified at 25 C.F.R. Part 151). However, those regulations cannot be applied by the Secretary to a transaction that is already complete. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. . . . [A] statutory grant of legislative rulemaking authority to an agency will not, as a general matter,

be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms").[5] These principles have been applied to prohibit retroactive application of interpretive, as well as legislative, rules. *Health Ins. Ass'n of Am. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 1095 (1995). Thus, a remand to the Secretary would not allow for an analysis of the transaction under rules issued after the transaction was consummated.

3. Even if the Eighth Circuit correctly reached the constitutionality of § 465, the Eighth Circuit was incorrect in concluding that § 465 violates the nondelegation doctrine. The Lower Brule Sioux Tribe adopts Interior's arguments (Pet. 20-25) on that issue. In addition, on June 3, 1996, the date Interior filed the petition for a writ of certiorari, the Court issued an important nondelegation doctrine decision. Because that case was not discussed in the petition, we will address how that decision impacts on the certiorari petition.

In the just-decided case, *Loving v. United States*, 116 S. Ct. 1737 (1996), the Court established clearly that executive branch expertise and longstanding regulatory responsibility are considered when a court judges if Congress has unconstitutionally delegated legislative authority. In *Loving*, an Army private challenged the constitutionality of the President defining (in rules for courts-martial) aggravating factors regarding imposition of the death penalty. The Court held that the statute was not unconstitutional, because the authority conveyed was within "the traditional authority of the President." *Id.* at 1750. The Court explained:

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[5] We have not located any statute that authorizes the Secretary to promulgate retroactive rules in the context of § 465.

> We think . . . that the question to be asked is not whether there was any explicit principle telling the President how to select aggravating factors, but whether any such guidance was needed, given the nature of the delegation and the officer who is to exercise the delegated authority. First, the delegation is set within boundaries the President may not exceed. Second, the delegation here was to the President in his role as Commander in Chief. Perhaps more explicit guidance as to how to select aggravating factors would be necessary if delegation were made to a newly created entity without independent authority in this area. . . . From the early days of the Republic, the President has had congressional authorization to intervene in cases where courts-martial decreed death.

Id. at 1750-51.[6]

The Secretary has been responsible for implementing federal Indian policy since the Department of the Interior was created in 1849, almost 150 years ago. Cohen, *Handbook of Federal Indian Law* 119 (1982). Even before the Department was created, the Executive Branch exercised extensive authority and discretion to regulate Indian affairs, through the War Department, established in 1789. *Id.* at 108.

Over the past century-and-a-half, the Secretary has borne significant responsibility for the management of Indian lands. Notably, the Secretary implemented the disastrous policy of allotting Indian tribal lands to individual members of

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[6] If the Court remands the case to the Eighth Circuit for resolution of the nonconstitutional issues, that court should consider the impact of *Loving* if the Eighth Circuit again addresses the nondelegation issue.

the tribes under the Dawes Act, 25 U.S.C. § 348. Amendments to the Dawes Act authorized the Secretary to lease lands that had been allotted to Indians. Act of Feb. 28, 1891, ch. 383, § 3, 26 Stat. 794, 795. Finally, amendments in 1906 gave the Secretary authority to terminate the federal trust power over allotted lands. 25 U.S.C. § 349.

Given the Secretary's long experience and discretionary responsibility in the allotment and management of Indian lands under the Dawes Act, it was only logical and appropriate for Congress, in 1934, to charge the Secretary with restoring some of the approximately 100 million acres that Indian tribes had lost. The Secretary had extensive, first-hand knowledge of the land transfers that had occurred and their effect on individual tribes. Furthermore, given the Secretary's other responsibilities relating to Indians (including management of forest and grazing lands, rights-of-way over Indian lands, energy and mineral resources, fish and wildlife management, economic development and business projects, and providing many other services regarding health, education and housing), he stands in a unique position to know what trust arrangements under § 465 might best compensate tribes for their prior losses.

Congress has tacitly ratified the Secretary's 60 years of land acquisitions under the IRA, 25 U.S.C. § 465. Since 1934, the Secretary has made thousands of trust acquisitions, encompassing an estimated 9 million acres of land. Pet. App. 17. However, even though it has amended other provisions of the IRA, Congress has never disapproved the Secretary's discretionary implementation of the authority granted under § 465. Pet. App. 23 n.11.

CONCLUSION

The petition for writ of certiorari should be granted. The Judgment of the Eighth Circuit should be vacated and the case remanded to that court to address nonconstitutional issues not decided in that court's earlier decision. In the alternative, the petition for writ of certiorari should be granted and the Court should grant plenary review and set the case for briefing and argument.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,
Petitioners,
v.
STATE OF SOUTH DAKOTA AND CITY OF OACOMA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, LYTTON BAND OF POMO INDIANS, SPOKANE TRIBE OF INDIANS, AND WINNEBAGO TRIBE OF NEBRASKA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

Amici are federally recognized Indian tribes with a compelling interest in the continued authority of the Secretary of the Interior ("Secretary") to take lands into trust for their benefit pursuant to 25 U.S.C. § 465 ("§ 465").[1] The decision of the Eighth Circuit in *South*

[1] The parties have consented to the filing of this brief *amicus curiae*. A letter from the Solicitor General on behalf of Petitioners and consent forms from the Respondents have been filed with the Clerk of the Court.

Dakota, et al. v. United States Dept. of the Interior, et al., 69 F.3d 878 (8th Cir. 1995) holds § 465 unconstitutional. If permitted to stand, that decision would deny the Winnebago Tribe of Nebraska and all other tribes in the Eighth Circuit a mechanism by which the Secretary may transfer land into trust, and thus would frustrate Congressional policies—enacted in a series of statutes known by singular reference as the Indian Reorganization Act of 1934 ("IRA") 25 U.S.C. §§ 461 *et seq.*—to preserve tribal culture, strengthen tribal governments, enhance tribal self-determination, and promote tribal economic self-sufficiency. *See also* Felix S. Cohen, *Handbook of Federal Indian Law*, at 147 n.30, (2nd ed. 1982) ("Cohen").

The power of the Secretary to take land into trust is essential; a good land base, under tribal control, is the foundation of tribal vitality. The transfer of land into trust frees both the land and the tribes from state and local taxes, laws and regulations, the operation of which is antithetical to the existence of tribal government. Possession of land held in trust by the United States demonstrates the unique sovereign status of tribes. *Amici* within and without the Eighth Circuit are gravely concerned because the decision of the Court of Appeals disrupts over 60 years of legal precedent and administrative actions which have operated nationwide to provide a modest land base for tribes and tribal governments.[2]

REASONS FOR GRANTING THE WRIT

The *Amici* respectfully submit that the following are among the compelling reasons why the petition for a writ of certiorari should be granted:

[2] In varying degrees, each tribe has been adversely affected by the debilitating policy of assimilation which dominated federal Indian policy until Congress passed the IRA and related legislation. J. Collier, "The Genesis and Philosophy of the Indian Reorganization Act," *Indian Affairs and the Indian Reorganization Act, The Twenty Year Record, U. of Ariz. Press* (1954); *see also* Cohen, 127-151.

I. THE DECISION OF THE EIGHTH CIRCUIT JEOPARDIZES 60 YEARS OF LAW CONCERNING LANDS HELD IN TRUST BY THE UNITED STATES FOR FEDERALLY-RECOGNIZED SOVEREIGN INDIAN TRIBES, THE MOST IMPORTANT ASPECT OF FEDERAL INDIAN LAW AND THE UNDERPINNING FOR THE EXERCISE OF TRIBAL GOVERNMENTAL POWERS.

The trust status of Indian lands is a central and indispensable pillar of federal Indian law and federal Indian policy. Trust status of lands dictates virtually every aspect of tribal, federal and state relalations and defines the jurisdictional powers exercised by tribal governments, the extent of state jurisdiction, and federal jurisdiction over Indians. Federal taking of lands into trust furthers the policies of self-determination and economic self-sufficiency which are embodied within the IRA and which have been continuously reaffirmed by Congress.

This Court has recognized that the IRA was passed to fulfill "Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.'" *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). Because these interrelated political and economic goals are dependent upon an adequate and federally protected tribal land base, Congress prohibited any further allotment of Indian lands[3] and expressly authorized the Secretary to take lands into trust for the benefit of Indians.

Approximately 9 million acres of land were taken into trust by the Secretary of the Interior under the IRA over the past 60 years. If the decision of the Eighth Circuit

[3] During the allotment era, tribal land holdings diminished from 138 million acres in 1887 to 48 million acres in 1934. *See County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 255-256 (1992); *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Committee on Indian Affairs*, 73d Cong., 2d Sess. 16 (1934) (Memorandum of John Collier, Commissioner of Indian Affairs).

is not corrected, it is not merely the status of virtually all of these 9 million acres of Indian trust land that will be placed in doubt. The status of land ownership is critical to jurisdictional powers exercised by the tribal governments. *See Montana v. United States*, 450 U.S. 554 (1981); *Brendale v. Confederated Tribes of Yakima Indian Nation*, 492 U.S. 408, 422-425 (1989). If this crucial underpinning is removed, all tribal governmental and regulatory authority over lands taken into trust under § 465 will be subject to challenge. The clearly mandated congressional goals of the IRA and the Indian Self-Determination and Education Assistance Act ("ISDEAA") 25 U.S.C. § 450f *et seq.* for self-governance and economic self-sufficiency could become impossible to achieve for many tribes.

The trust status of Indian lands also plays a significant role in defining the extent of state jurisdiction over Indian affairs and serves as a necessary buffer against state intrusion into those affairs. The Eighth Circuit decision, if left standing, would drastically alter this delicate arrangement. For example, State and local governments are barred from levying taxes on Indian trust lands. *Oklahoma Tax Commission v. Chickasaw Nation*, —— U.S. ——, 115 S. Ct. 2214 (1995); *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993). This tax benefit of trust status is not happenstance—it effectuates the policy of the IRA by encouraging economic opportunity and protecting tribal self-governance. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 265 (1992). If the trust status of land is removed, lands owned by tribal governments may be subject to state and local property taxes, again in derogation of the clear policies of the IRA and ISDEAA.

The Eighth Circuit's decision has direct implications for federal criminal law as well. Indian land status plays a crucial role in determining federal criminal jurisdiction

over Indians; it forms the jurisdictional basis for federal prosecuton of individual Indians for certain crimes under the Major Crimes Act. 18 U.S.C. §§ 1151 *et seq.* If the status of the land is in question, so is the federal criminal jurisdiction which depends thereon.

The Eighth Circuit's decision also calls into question thousands of mineral, grazing, and commercial leases of tribal trust lands covering over fifteen million acres. Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471 (1994). Upon the approval of the Secretary, tribes and individual Indians may lease trust lands for various purposes, including business opportunities. 25 U.S.C. §§ 415 *et seq.* In some situations, these leases may be for periods of up to 99 years. If the underlying land was unconstitutionally conveyed into trust, the Secretary's approved leases of those lands are at least in substantial doubt. Many private lessors have invested millions of dollars in reliance upon the validity of these leases.

At a minimum, the decision of the Eighth Circuit precludes any future fee-to-trust acquisitions for tribes in the Eighth Circuit, and possibly elsewhere. Achievement of the goals of the congressional policies discussed above and the Secretary's role in implementing them will be severely impeded. All this because the Court of Appeals reached out to decide a constitutional issue when it did not need to do so, and without considering all the relevant factors and doctrines involved.

II. THE COURT BELOW UNNECESSARILY ADDRESSED A CONSTITUTIONAL ISSUE.

As the dissent below correctly states, constitutional issues should not be reached unless absolutely necessary. 69 F.3d at 885 (Murphy, J., dissenting). *See Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint that prior to reaching any

constitutional questions, federal courts must consider nonconstitutional grounds for decision.") The Eighth Circuit ignored this "fundamental rule of judicial restraint" by unnecessarily ruling on the constitutional issue before exhausting other questions of statutory construction.

The primary focus of the appeal was the District Court's ruling that it lacked jurisdiction to review plaintiffs' claims under the Administrative Procedures Act, 5 U.S.C. §§ 701-706 ("APA") because the Quiet Title Act, 28 U.S.C. § 2409a did not waive the immunity of the United States in disputes involving Indian trust lands. The Eighth Circuit panel did not decide this critical threshold issue; instead, it leaped to the constitutional issue by relying on the Secretary's mere assertion that his decision was unreviewable.[4]

The Eighth Circuit's failure to address the nonconstitutional issue is especially egregious in this case because the availability of judicial review of an agency action is directly relevant to determining the constitutional issue it rushed to consider. As the dissent correctly noted:

> "[R]esolution of the APA inquiry could inform the analysis of the delegation issue . . . The availability of judicial review of the Secretary's actions may also serve to limit the delegation here . . . Judicial review 'is a factor weighing in favor of upholding a statute against a non-delegation challenge.'" (citing *United States v. Garfinkel*, 29 F.3d 451, 459 (8th Cir. 1994)).

69 F.3d at 885, 888.

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[4] As noted in the United States' Petition, the Department of the Interior has promulgated a regulation that addresses the reviewability issue and specifically provides for an opportunity for judicial review of the decision to take lands into trust before title is actually transferred to the United States. *See* Land Acquisitions (Nongaming), 61 Fed. Reg. 18,082 (1996) (to be codified at 25 C.F.R. 151.12).

The Eighth Circuit thus not only unnecessarily addressed the constitutional issue, but did so without considering all relevant factors.

III. THE NONDELEGATION DOCTRINE, WHICH HAS NOT BEEN INVOKED BY THIS COURT FOR OVER 60 YEARS, WAS INAPPROPRIATELY APPLIED BY THE COURT OF APPEALS; THE STATUTE IN QUESTION CLEARLY SURVIVES SCRUTINY UNDER THE DOCTRINE OF CONGRESSIONAL ACQUIESCENCE, A MORE RECENT AND MORE OFTEN USED DOCTRINE.

The Eighth Circuit erroneously applied the nondelegation doctrine, which has not been invoked by this Court to find an unconstitutional delegation to another government agency since *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), without considering the fact of congressional acquiescence in and reaffirmation of the delegation of authority made under § 465. This Court routinely applies the congressional acquiescence doctrine, *see, e.g., Haig v. Agee*, 453 U.S. 280, 300-301 (1981); *Dames & Moore v. Regan*, 453 U.S. 654, 678-682 (1981); *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73 (1915), even where the Executive exercises a power that has not been expressly delegated.

> "[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President by § 1 of Art. II." Past practice does not, by itself, create power, but "long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] has been [taken] in pursuance of its consent. . ."

Dames & Moore v. Regan, 453 U.S. 654, 686 (1981), *quoting United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73 (1915).

Congress not only delegated the original authority to the Secretary; it has since also acquiesced in and consented to the 60-year-old practice of the Secretary taking land into trust for Indians pursuant to published regulations, such as 25 C.F.R. § 151. Indeed, rather than objecting to the manner in which the Secretary has been exercising this power, Congress instead expressly reaffirmed this delegation of authority to the Secretary by further extending its application in the Indian Land Consolidation Act of 1983 ("LCA"), 25 U.S.C. § 2201 *et seq.*

In considering the LCA, Congress was faced with the problem of a checkerboard pattern of land ownership within some reservations, and with heirships in allotments becoming increasingly fractionated. All this made economic use of the land by the tribes extremely difficult. There was, moreover, no comprehensive federal land consolidation authority in place for all tribes. *See* H.R. No. 97-908, 97th Cong., 2d Sess. 4 (1982), *reprinted in* 1982 U.S.S.C.A.N. 4415 *et seq.* The Secretary of the Interior reminded Congress that § 465 gave him land acquisition authority to address this problem, but noted that the IRA, of which § 465 was a part, did not apply to all tribes. *See* Letter to Hon. Morris K. Udall, Chair, House Committee on Interior and Insular Affairs, from Kenneth L. Smith, Assistant Secretary of the Interior—Indian Affairs, *reprinted in* 1982 U.S.S.C.A.N. at 4422 *et seq.* The Secretary recommended that Congress extend his § 465 authority to all tribes, unless they already had their own specific land acquisition and disposal acts, as some did. *Id.*

In enacting the LCA, Congress did exactly that. Section 2202 of the LCA provides, in part: "The provisions of section 465 of this title shall apply to all tribes notwithstanding the provisions of section 478 of this title . . . ." 25 U.S.C. § 2202. The legislative history explains:

> Section [2202] extends the provisions of Section 5 of the [IRA] to all tribes provided that nothing in this section is intended to supersede any previous Act of Congress which governs the acquisition of land for Indians in any specific tribe, reservation or State. The intent of the Committee is not to overrule any Act of Congress that explicitly purports to regulate land acquisitions and disposals within a specific area or for a specific tribe, unless such Act has already been amended or considered superseded by Section 5 of the Indian Reorganization Act. On the other hand, Section 5 of the Indian Reorganization Act would automatically be applicable to any tribe, reservation or area excluded from such Act, including tribes that have previously voted to reject the [IRA] pursuant to section 18 of such Act.

H.R. Rep. No. 97-908, *supra, reprinted in* 1982 U.S.S.C.A.N. at 4416.

The Eighth Circuit did not consider these issues. This Court should grant review because the nondelegation doctrine should not be applied where there is clear congressional acquiescence and reaffirmation of the delegation at issue.

IV. EGREGIOUS MISSTATEMENTS BY THE COURT OF APPEALS DEMONSTRATE A DISREGARD OF THE RECORD AND OF OTHER RELEVANT LAWS AND LIMITING REGULATIONS.

This Court should also exercise its supervisory review over the Court of Appeal's clear disregard of the record in this matter and the limiting effect of other laws and of the Secretary's own regulations. As part of its decision ruling the statute unconstitutional, the court below noted the allegation that the Tribe planned to conduct gaming on the land and that the Secretary was aware of the Tribe's true intentions. 69 F.3d at 880. This allegation was not borne out by the record below. In fact, the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C.

§§ 2701 *et seq.*, prohibits gaming on lands acquired in trust after 1988 unless the Governor of the State involved agrees with a secretarial determination that it is in the Tribe's best interest and is not detrimental to the surrounding community. 25 U.S.C. § 2719(b)(1)(A). The court did not take into account the provisions of IGRA that protect states' interests concerning tribal gaming on newly acquired Indian lands.

Among other exaggerated and misleading statements, the Eighth Circuit asserted that:

> By its literal terms, the statute permits the Secretary to purchase a factory, an office building, a residential subdivision, or a golf course in trust for an Indian tribe, thereby removing these properties from state and local tax rolls. Indeed, it would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present.
>
> * * * *
>
> [T]he statute leaves the Secretary free to acquire for a multitude of purposes, for example, to expand a reservation, to provide farm land for rural Indians, to provide a factory for unemployed urban Indians, to provide a golf course for tribal recreation, or to provide a lake home for a politically faithful tribal officer. . . .

Id. at 882.

These flagrantly misleading and absurd hypotheticals fail to acknowledge the existence of the regulations governing acquisitions of land into trust that are found in 25 C.F.R. § 151. Those regulations, drafted in accordance with the legislative history and policies of the IRA, guide the Secretary in his decision-making. For example, the only land that can be acquired for an individual Indian is land that is within a reservation or is already in trust status. 25 C.F.R. § 151.3(b). It would thus be impossible to acquire the Empire State Building for a

tribal chairperson, even if one were utterly to suspend credulity and posit that such an acquisition was an activity upon which the federal government might possibly be tempted to embark.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE MINNESOTA CHIPPEWA TRIBE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE *AMICUS CURIAE*

The Minnesota Chippewa Tribe (the "MCT") is a federally recognized tribe of Indians[1] that is organized under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. 476. It operates under a Constitution and Bylaws originally approved by the Secretary of the Interior in 1936 and re-approved as revised on March 3, 1964. The Tribe serves as the umbrella organization for six bands of Minnesota Chippewas: Bois Forte (Nett Lake), Fond du Lac, Grand Portage, Leech Lake, Mille Lacs, and White Earth. Since the passage of the Indian Reorganization Act in 1934 (the "IRA")[2], substantial amounts of land have been acquired by the United States pursuant to Section 5 of the IRA (25 U.S.C. 465) either in trust for the Tribe itself or for its individual constituent bands. Currently, action is pending before the Secretary of the U.S. Department of the Interior on requests to take over 120 parcels of land into trust for the various Bands of the Tribe. The decision of the Court of Appeals in this case directly affects these and all future transfers into trust by the Tribe and its six Bands.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Eighth Circuit has found one of the core statutes of federal Indian law to be unconstitutional by adopting an extraordinarily strict formulation of the so-called "non-delegation doctrine". Whether Section 5 of the IRA is an unconstitutional delegation of legislative authority is a fundamental and crucially important question of both constitutional law and federal Indian law.

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[1] *See* 48 Fed. Reg. 56854 (1983).

[2] 25 U.S.C. 461 *et seq.*

The significance of Section 5 of the IRA to Federal Indian Law is best illustrated by considering its importance to individual reservations like those of the various Bands of the Minnesota Chippewa Tribe. The six component Bands of the Minnesota Chippewa Tribe occupy six separate reservations in Northern Minnesota. The land bases of all of these reservations were decimated in the late Nineteenth and early Twentieth centuries by a combination of allotments to individual Indians and sale of the of so-called "surplus" reservation land to non-Indians. Since the passage of the IRA in 1934, the constituent Bands of the MCT slowly have been recovering their lost reservation lands, but the task is far from over, and the loss of Section 5 of the IRA would be a serious setback.

Tribal lands are the foundation upon which tribal sovereignty and self-determination rest. If tribal lands are not held in the name of the United States pursuant to Section 5, tribal sovereignty would be weakened and the tribal self-determination would be threatened contrary to the longstanding policies of the Federal Government as expressed in the extensive body of law, regulation and policy directives that have been adopted since 1934. This body of legislative and executive policy favoring tribal sovereignty and self-determination is clear, consistent and coherent. To strike down Section 5 on the grounds that Congress has failed to fulfill its constitutional duty to provide reasonable guidance to the Secretary of the Interior ignores not only the express statutory guidance contained in the IRA as a whole and the general policy guidance contained in nearly all subsequent federal Indian legislation, but also the specific purposes behind Section 5 of the IRA as established by its legislative history and the administrative rules adopted by the Secretary of the Interior to implement it.

ARGUMENT

The six Bands of the Minnesota Chippewa Tribe occupy separate reservations scattered across Northern Minnesota. All of these reservations suffered the devastating effects of the "Allotment Era" of federal Indian policy. The allotment system came to Minnesota in the form of the so-called "Nelson Act" of 1889. Act of January 14, 1889, ch. 24, 25 Stat. 642. The Nelson Act, which was one of a number of "surplus land acts" that applied the General Allotment Act[3] to particular tribes, provided for the cession into trust of all of the lands of the Chippewas in Minnesota, except sufficient land to make allotments to individual Indians, and the conveyance of such "surplus lands" to non-Indians as "pine lands" or homesteads. By the time the Allotment Era came to an end in 1934 with the passage of the IRA, all but a tiny fraction of the over 1.7 million acres of land in the reservations of the bands that subsequently became part of the Minnesota Chippewa Tribe had been lost to timber companies, land speculators and homesteaders. *See* Chippewa Indians of Minnesota v. United States, 80 Ct. Cl. 410 (1935), *affirmed*, 301 U.S. 358 (1937); Minnesota Chippewa Tribe v. United States, 11 Cl. Ct. 221 (1986); 4 Folwell, A History of Minnesota, 219-96.

The IRA not only ended the Allotment Era and put federal Indian policy squarely behind tribal self-determination, it also gave Indian tribes a tool to begin to rebuild their land bases. *See* Judith V. Royster, The Legacy of Allotment, 27 Ariz. St. L. J. 1, at 7-8 (1995). Section 5 of the IRA authorized the Secretary of the Interior to acquire land "for the purpose of providing land for Indians" and required land so acquired to be "taken in the name of the United States in

[3] Ch. 119, 24 Stat. 388.

trust for the Indian tribe or individual Indian for which the land is acquired." 25 U.S.C. 465.

As Congress intended, this provision became, and remains today, the primary tool for restoring tribal lands lost during the Allotment Era. Federal trusteeship of tribal lands provides an important extra measure of insurance that these lands will never again be taken from the tribes or subjected to the hostile actions of state or local governments. No other available land acquisition method provides similar protection. The loss of Section 5 would be a serious blow to tribal land recovery efforts--efforts which are essential to maintaining the health, welfare and governmental authority of the Tribes themselves.

On the MCT reservations tens of thousands of acres of land have been taken into trust for the Tribe or its constituent bands pursuant to Section 5 over the past sixty-two years, but the task of rebuilding the tribal land base is far from done. Non-Indians, along with the state and federal governments, still hold the vast majority of the land in five of the six MCT reservations. Lands still need to be acquired for housing, economic development, natural resource and environmental management, construction of tribal facilities, protection of cultural and historical places and other public purposes.

In recent years, the six Bands of the Minnesota Chippewa Tribe have continued to rely on Section 5 to transfer land into trust. As various tribal enterprises have prospered, the Bands have allocated substantial portions of their earnings to land acquisition, and nearly all of the lands so acquired have been or are in the process of being placed in trust.

A brief review of the status of pending requests by the constituent bands of the MCT for trust acquisitions by the Secretary of the Interior illustrates not only the critical importance of Section 5 of the IRA but also the fact that the process is being used responsibly to acquire lands consistent with the purpose of the IRA as recognized by the Secretary of

the Interior in 25 CFR 151.3.[4] At present there are over 120 pending proposals for trust acquisitions for the MCT Bands. These range in size from one or two acres to several hundred, and total almost 7,000 acres. Nearly all are on a reservation, and all are for the kinds of public purposes contemplated by the drafters of the IRA. For example, the Leech Lake and Fond du Lac Bands each have 25 requests pending. All are to expand the reservation land base or to provide much-needed housing sites for Band members. Similarly, the White Earth Band has thirty-two requests pending, all of which are to expand the reservation land base and to provide housing sites, except for two parcels, both on the reservation, which are for gaming purposes. The reasons for the proposed trust acquisition of six parcels on the Bois Forte Reservation are to provide housing sites, to support economic development, and to site a sewage treatment plant. The approximately 20 pending requests by the Mille Lacs and Grand Portage Bands are for similar purposes.

Obviously, these kinds of proposals are well within the congressional purposes behind the IRA as summarized by the United States in its Petition for a Writ of Certiorari at 4-5, 16-17 and 21-22. The Court of Appeals was manifestly in error when it characterized Section 5 as lacking "perceptible 'boundaries'" and "'intelligible principles' that constrain this delegated authority." State of South Dakota; City of Oacoma v. United States Department of the Interior, 69 F.3d 878, 882,

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[4] 25 CFR 151.3, paragraph (a) provides that land may be acquired for a tribe in trust under the following circumstances:

> (1) when the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or (2) when the tribe already owns an interest in the land or, (3) when the Secretary determines that the acquisition of land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

Appendix to Petition for Writ of Certiorari at 7a. The legislative history of the IRA, and its language as discussed by the United States in its Petition for Certiorari at 21-23, as well as subsequent legislation dealing with Indian affairs,[5]

[5] Since the passage of the IRA (with a brief period of backsliding in the 1950s), Congress and successive Presidents have built on this foundation a body of law and policy that supports tribal sovereignty and self-government. Prime examples include: President Johnson's Message to the Congress on Goals and Programs for the American Indians, Pub. Papers 335 (1968-69) (calling for a policy of "self-help, self-development, and self-determination for Indians"); President Nixon's Special Message to Congress on Indian Affairs, Pub. Papers 564 (1970) (proposing federal promotion of tribal self-determination, sovereignty and control over Indian country); President Reagan's Statement on Indian Policy, 1 Pub. Papers 96 (1983) ("Our policy is to reaffirm dealing with Indian tribes on government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination"); President Bush's Statement Reaffirming the Government-to-Government Relationships Between the Federal Government and Indian Tribal Governments, 27 Weekly Comp. Pres. Doc. 783 (June 14, 1991); Memorandum of President Clinton on Government-to-Government Relations with Native American Tribal Governments, 30 Weekly Comp. Pres. Doc. 936 (April 28, 1994) (reaffirming policy); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450a(b) (1983) (declaring Congressional "commitment to... the establishment of a meaningful Indian self-determination policy"); Indian Financing Act of 1974, 25 U.S.C. 1451 (1983) (promoting tribal responsibility "for the utilization and management of their own resources"); Indian Child Welfare Act of 1868, 25 U.S.C. 1901, *et seq.* (1983) (granting exclusive jurisdiction over Indian child custody to tribal courts); Tribal Self-Governance Demonstration Project Act of 1991, 25 U.S.C. 450f (1995) (amending the Indian Self Determination Act to provide devolution of federal program responsibilities and federal funding to several tribal governments); Clean Air Act Amendments of 1991, 42 U.S.C. 7602 (authorizing tribal governments to be treated as states for the purposes of adopting reservation air quality standards); and the Indian Tribal Justice Act, 25 U.S.C. 3601, 3602, 3611, 3612, 3613, 3614, 3621, 3631 (1995) (recognizing that one aspect of tribal sovereignty is the power to establish tribal courts). The Secretary's rules governing the transfer of land into trust under Section 5 of the IRA certainly consistent with the entire body of contemporary federal Indian law which in turn is based on the IRA.

leave no doubt about the purposes of Section 5 or any uncertainty that the rules of the Department of the Interior effectuate these purposes.

CONCLUSION

If it is allowed to stand, the decision of the Court of Appeals will do serious harm to the to the fundamental federal policies favoring tribal sovereignty and self-determination. The ability to transfer land into trust pursuant to Section 5 of the IRA is one of the most important means of effectuating these policies. For these reasons the Minnesota Chippewa Tribe urges the Court to grant the Government's Petition for Certiorari.

Dated: July 2, 1996.

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UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,
Petitioners,
v.
STATE OF SOUTH DAKOTA and CITY OF OACOMA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICI CURIAE OF THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, CHEYENNE RIVER SIOUX TRIBE, CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, HO-CHUNK NATION, FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA, PUYALLUP TRIBE, ST. CROIX BAND OF CHIPPEWA INDIANS, AND STANDING ROCK SIOUX TRIBE IN SUPPORT OF PETITIONERS

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IN THE

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OCTOBER TERM, 1996

No. 95-1956

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BRIEF AMICI CURIAE OF THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, CHEYENNE RIVER SIOUX TRIBE, CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, HO-CHUNK NATION, FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA, PUYALLUP TRIBE, ST. CROIX BAND OF CHIPPEWA INDIANS, AND STANDING ROCK SIOUX TRIBE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI

Each of the Amici Tribes is a federally recognized Indian Tribe. The interest of amici curiae is vital and immediate. Each Tribe gave up large areas of land to the United States, which in return assumed the duty of protecting the Tribe in those retained. *See Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943). Notwithstanding that obligation, each of these Tribes con-

tinued to suffer devastating land losses, particularly during the Indian allotment era,[1] and from the decimation of their land base followed the destruction of their economies, institutions, culture and communities.

To reverse this policy and the disastrous effect that it had on Indian tribes, Congress in 1934 enacted the Indian Reorganization Act, 25 U.S.C. §§ 461-479 ("IRA"). By it, Congress sought "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). The Act's purposes—the rebuilding of tribal self-government and Indian communities—are to be achieved by tribal and federal implementation of the Act's eighteen sections. Of these, Section 5, 25 U.S.C. § 465, which authorizes the Secretary of the Interior to acquire land in trust for Indians, is a crucial part. That section has, for more than 60 years, served as the principal mechanism for restoration of trust land to Indians and tribes.

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[1] Between 1887, when the General Allotment Act was enacted, and 1934, Indian land holdings were reduced by 90 million acres, leaving but 48 million acres in Indian hands. Felix S. Cohen, *Handbook of Federal Indian Law* 138 (1982 ed.). Amici Tribes were among those to sustain these losses. For example, under the allotment policy, by the 1920s almost all of the land within the 18,000-acre reservation of the Puyallup Tribe had passed into non-Indian ownership leaving the Tribe impoverished. The Tribe has since been able to reacquire some of those lands under the statute at issue in this case, Section 5 of the Indian Reorganization Act. When the City of Tacoma challenged the Secretary's authority to acquire land, the court rejected that challenge, finding that the "Puyallup Tribe . . . is a striking example of an entity the drafters of section 5 sought to aid." *City of Tacoma v. Andrus*, 457 F. Supp. 342, 346 (D.D.C. 1978). When the Puyallup subsequently settled a land claim with the City, the agreement included Congress' assurances that the Secretary shall continue to exercise "the authority provided him in section 5 of the . . . [IRA], and shall apply the standards set forth in part 151 of title 25, Code of Federal Regulations. . . ." 25 U.S.C. § 1773c. The Puyallup Tribe now has approximately 600 acres of land in trust.

Section 5 has been essential for the Amici Tribes to slow—though not necessarily stop—their loss of land. Indeed, to this day, far more Indian land passes out of trust than into trust.[2] Each Amici Tribe has an interest in lands held in trust pursuant to Section 5, and a substantial interest in the constitutionality and continued implementation of that statute.[3]

SUMMARY

Notwithstanding 60 years of jurisprudence recognizing the Secretary's authority in Indian affairs, including his authority to acquire land in trust for Indians, a divided panel of the Court of Appeals for the Eighth Circuit struck down Section 5 of the IRA as unconstitutional. Invalidation of an Act of Congress is sufficient reason in itself to grant the petition for *certiorari*. *See United States v. Gainey*, 380 U.S. 63, 65 (1965).

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[2] For example, for the sixteen tribes with reservations in Nebraska, North Dakota and South Dakota, including Amici Standing Rock Sioux Tribe and Cheyenne River Sioux Tribe, the Bureau of Indian Affairs reports that from 1985 to 1995, a total of 46,399 acres passed from trust to fee status while 18,120 acres were taken into trust. As to the Cheyenne River Sioux Reservation, since 1934, 287,216 acres passed out of trust, while 12,921 acres had been taken into trust.

After losing several million acres of their land in southern Wisconsin and northern Illinois in treaties with the United States, Amicus Ho-Chunk Nation (Wisconsin Winnebago) lived as squatters and fugitives in their ancestral homes. *See* Nancy Lurie, "Winnebago," 15 *Handbook of North American Indians*, at 697-99,702-03 (Smithsonian Institution 1978). Even after they were allowed by Congress to use their own funds to purchase trust allotments, most of those lands were lost when placed on county tax rolls, with many such tracts passing out of trust in the 1950s. Today, the Ho-Chunk Nation holds only 845.23 acres of land in trust, restored to it under Section 5 of the IRA.

[3] All parties have consented to the filing of this brief amici curiae. The consents have been filed with the Clerk.

Review is further compelled by the grounds on which the court of appeals ruled. The decision conflicts with those from this Court that expressly reject nondelegation doctrine challenges where, as here, the " 'entity exercising the delegated authority itself possesses independent authority over the subject matter.' " *Loving v. United States*, No. 94-1966, slip op. at 24, 64 U.S.L.W. 4390, 4397 (U.S. June 3, 1996) (quoting *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975) and citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-22 (1936)). These decisions control in this case. Contrary to their teaching, the court of appeals invalidated Section 5 on nondelegation doctrine grounds without any consideration of the independent constitutional authority vested in the Executive branch in Indian affairs, or the broad discretionary authority historically exercised by the Executive—not only in Indian affairs but also with regard to the acquisition and administration of land for federal and other purposes. Indeed, the court made no reference to *United States v. Mazurie*, which was this Court's controlling precedent.

The court's declaration that Section 5 is unconstitutional further conflicts with every other decision, including one from this Court, to address Section 5. This Court recognized the vitality of Section 5 in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 155-56 (1973), and other courts have consistently rejected challenges to the Secretary's authority to take land in trust under it. *E.g., Chase v. McMasters*, 573 F.2d 1011, 1015-16 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978); *State of Florida v. United States Dep't of the Interior*, 768 F.2d 1248, 1252 (11th Cir. 1985); *City of Sault Ste. Marie v. Andrus*, 532 F.Supp. 157, 162 (D.D.C. 1980); *City of Tacoma v. Andrus*, 457 F.Supp. 342, 346 (D.D.C. 1978).

Finally, the decision conflicts with established constitutional jurisprudence for the court of appeals declared Section 5 unconstitutional by reference to a hypothetical

land acquisition—"the purchase [of] the Empire State Building in trust for a tribal chieftain as a wedding present." Pet. App. 7a. In addition, the court declined to resolve an issue—the availability of judicial review of a Secretarial decision to take land into trust—which could have obviated the perceived constitutional infirmity. *See American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). The court further read Section 5 in isolation from the remainder of the Act of which it is a part, without deference to the longstanding administrative practice, and without consideration of the oversight that Congress has exercised with regard to its implementation.

The court of appeals' decision has prompted states in other circuits to initiate actions challenging the Secretary of the Interior's authority to acquire land in trust for Indians. It harms every Indian tribe by subverting the remedial intent of Congress in the Indian Reorganization Act, and by raising questions on the validity of trust land acquisitions made prior to the date of the decision. This Court should grant the petition and reverse the judgment below, or vacate and remand for reconsideration in light of this Court's decision in *Loving* and the Secretary's recent action promulgating a rule that provides for judicial review of trust land decisions, 61 Fed. Reg. 18082 (April 24, 1996).

REASONS FOR GRANTING THE PETITION

I. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S RULINGS ON THE NONDELEGATION DOCTRINE STATED IN *LOVING, MAZURIE* AND *CURTISS-WRIGHT*.

A. The President's constitutional and historic authority in Indian affairs renders the nondelegation doctrine inapplicable to Section 5.

This Court has consistently *rejected* nondelegation doctrine attacks on statutes which delegate power to an entity that " 'itself possesses independent authority over the

subject matter.'" *Loving v. United States*, No. 94-1966, slip op. at 24 (quoting *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975))[4]; *accord United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-22 (1936). The rule, which was clearly stated in *Mazurie*, reflects the basic principle that each branch of the federal government—legislative, executive, and judicial—has authority to act without delegation from the other. Thus "[w]hen the Executive acts, it presumptively acts in an executive or administrative capacity as defined in Article II." *INS v. Chadha*, 462 U.S. 919, 951 (1983). And where "the delegated duty . . . is interlinked with duties already assigned to the President by express terms of the Constitution, . . . the same limitations on delegation do *not* apply. . . ." *Loving*, slip op. at 24 (emphasis supplied.)

These principles control here. The power of the Executive in Indian affairs has an independent basis in both the treaty making and war powers, U.S. Const. art. II, § 2, cl. 1-2, as well as in the President's power and duty to "take Care that the Laws be faithfully executed. . . ." U.S. Const. art. II, § 3. As this Court stated in *Morton v. Mancari*, "Article II, § 2, cl. 2 [which] gives the President the power, by and with the advice and consent of the Senate, to make treaties . . . has often been the

[4] In *Mazurie* this Court, in a unanimous decision, upheld against a nondelegation doctrine challenge a statute under which Congress delegated to Indian tribes the power to prohibit or regulate alcoholic beverages in Indian country. If a tribe exercises this authority, the statute makes violation of the tribal ordinance a federal criminal offense. 18 U.S.C. §§ 1154, 1161. Rejecting the claim that the statute was an invalid delegation of legislative power under *Panama Refining Co.*, the Court stated the rule—derived from *Curtiss-Wright* and most recently applied in *Loving*—that the limitations imposed by the nondelegation doctrine "are . . . less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter," and found that Indian tribes possessed such independent authority. *Mazurie*, 419 U.S. at 556-58.

source of the Government's power to deal with the Indian tribes." 417 U.S. 535, 552 (1974); *see also Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943).[5]

The Executive branch, through the Secretary of the Interior, also bears responsibility for fulfilling the United States' trust obligations to Indians, as this Court has often confirmed. *See United States v. Creek Nation*, 295 U.S. 103, 109, 110 (1935); *Cramer v. United States*, 261 U.S. 219, 227 (1923); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919). And this Court has further repeatedly upheld the President's authority to create Indian reservations by Executive order. *See Arizona v. California*, 373 U.S. 546, 598 (1963); *United States v. Midwest Oil Co.*, 236 U.S. 459, 470 (1915).

In clear conflict with the teaching of *Mazurie* and *Curtiss-Wright*—as recently reaffirmed by *Loving*—the court of appeals did not consider the constitutional powers and historic role of the Executive branch in Indian affairs. As a result, the court of appeals misapplied the nondelegation doctrine to Section 5 of the IRA. Properly applied, each of these cases compels the opposite result.

First, as in *Mazurie*, *Curtiss-Wright* and *Loving*, there is no question that Congress has the constitutional power to authorize the act at issue—here to acquire land in trust for Indians. *Seber*, 318 U.S. at 715-19[6]; *United States v. McGowan*, 302 U.S. 535, 537, 539 (1938).

[5] This is in addition to Congress' power under the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3.

[6] Section 5 authorizes acquisition by purchase or donation, which is all that is at issue in this case. Moreover, in authorizing these acquisitions, Congress was well aware that land taken in trust would not be subject to state and local taxation. *Hearing before the Senate Committee on Indian Affairs on S. 2755*, 73rd Cong., 2d Sess. 160 (1934). Congress determined that in light of the financial benefits provided the states elsewhere, the protection of state tax bases was outweighed by the need to provide Indians with trust lands—a policy decision which is the exclusive prerogative of Con-

Second, just as in *Mazurie*, *Curtiss-Wright* and *Loving*, the entity to which the power was delegated has independent authority in the area of the delegation and has historically exercised duties interlinked with those covered by the statute. As noted, rulings of this Court have long recognized the President's powers under Article II as a source of federal authority in Indian affairs. And by the time Congress enacted the IRA in 1934, the Executive branch's broad discretionary authority in Indian affairs was well-established [7] and regularly upheld by this Court.[8]

Thus, if Section 5 of the IRA is a delegation of authority at all, it is to an official already "possess[ing] independent authority over the subject matter," *Mazurie*, 419 U.S. at 556-57, who is being assigned duties by Congress that are "interlinked with duties already assigned to the President by express terms of the Constitution," *Loving*, slip op. at 24. Accordingly, "the same limitations

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gress. *See Seber*, 318 U.S. at 715-19 (1943) ("[T]he fact that the Acts withdraw lands from the tax rolls . . . is for the consideration of Congress, not the Courts.")

[7] *See* 25 U.S.C. § 2 (Commissioner of Indian Affairs to have "management of all Indian affairs and of all matters arising out of Indian relations," originally enacted in the Acts of July 9, 1832, ch. 174, § 1, 4 Stat. 564; July 27, 1868, ch. 259, § 1, 15 Stat. 228); 25 U.S.C. § 9 ("President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs. . . ." originally enacted in the Act of June 30, 1834, ch. 162, § 17, 4 Stat. 738); *see also* 25 U.S.C. § 81; *Cf. Loving*, slip op. at 24-25.

[8] *See, e.g., Parker v. Richard*, 250 U.S. 235 (1919) (upholding Secretarial authority for the collection, care, and disbursement of royalties under oil lease); *United States ex rel. West v. Hitchcock*, 205 U.S. 80 (1907) (upholding the Secretary's power to make membership decision in reviewing application for allotment). *Accord Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 691 (1979) (upholding and giving preemptive force to Secretary's regulations on off-reservation fishing rights issued "under its general Indian powers, 25 U.S.C. §§ 2, 9"); *Arizona v. California*, 373 U.S. at 598 (upholding President's authority to create Indian reservations by Executive order.)

on delegation do not apply." *Id.* The court of appeals overlooked this clear conclusion.

B. The acquisition of land, as authorized by Section 5 of the Indian Reorganization Act, is an executive, not legislative function, and therefore falls outside the scope of the nondelegation doctrine.

A statute that authorizes the Executive branch to take an action or make a decision does not necessarily delegate a legislative function, even if the executive action contemplated by the statute were impossible without prior legislation. *See, e.g., Myers v. United States*, 272 U.S. 52 (1926) (power of removal is executive power though the office is the creation of Congress); *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-39 (1952) (Jackson, J., concurring). These actions are exercises of executive power, even though they may depend upon an act of Congress, and even though Congress may in some circumstances expressly restrict their exercise. *Humphrey's Executor v. United States*, 295 U.S. 602, 629-32 (1935).

Acquisition of land for federal purposes—which includes that necessary to carry out the United States' trust responsibility to Indian tribes—is an inherently executive function. In enacting the IRA, Congress chose to rely on the Secretary of the Interior to make decisions regarding the acquisition of land in trust for Indians. Because the acquisition of land to meet the purposes of the IRA requires consideration of factors that will vary with each parcel and each tribe, it can hardly be expected that Congress would itself enact separate legislation with regard to each tract to be acquired. To the contrary, it was entirely consistent with established precedent for Congress to call upon the Secretary of the Interior to perform that task, and given the diverse needs and circumstances of Indian tribes nationwide, to accord to the Secretary broad discretionary authority to do so.

The same is true with regard to the function of acquiring land for federal purposes. Congress has consistently

authorized, and this Court has repeatedly approved, discretionary exercises of executive power by Executive branch officials in land transactions. The Court has found no delegation problem in federal statutes that vest executive branch officials with broad discretionary power to condemn lands for public purposes, a role far more intrusive than acquiring land from willing sellers or donors, which is all that is at issue in this case. *United States v. Carmack*, 329 U.S. 230 (1946); *see also Berman v. Parker*, 348 U.S. 26 (1954); *Chappell v. United States*, 160 U.S. 499, 510 (1896).

In *Carmack*, this Court discussed the need for executive discretion in land acquisition statutes. The Court noted, as to the acts in question, that: "[n]othing has been found in the legislative history of these acts to indicate that Congress intended to give its agents less than the fullest possible authority of Congress in selecting cities and sites." 329 U.S. at 236 n.5. The Court described the acts as a natural exercise of Congress' constitutional power:

> These Acts were natural means for Congress to adopt in putting its constitutional powers into use on a scale commensurate with the size of the nation and the need of the time. Neither Act imposed expressly any limitations upon the authority of the officials designated by Congress to exercise its power of condemnation in procuring sites for public buildings deemed necessary by such officials to enable the Government to perform certain specified functions.

Id. at 236. And this Court declined to read into those land acquisition statutes, express or implied limitations on the officials' authority to acquire such land, finding that the need for any such limitation was a matter of legislative policy and not a decision for the courts. *Id. Accord Berman*, 348 U.S. at 33; *Chappell*, 160 U.S. at 510.

Finally, as reflected by the many decisions in which this Court has considered Indian reservations created by Executive order, the Court has never expressed a concern

about the discretion exercised by the Executive in so doing, but has instead sustained the President's power to create such reservations on the basis of Congress' long-standing acquiescence in the practice, *see, e.g., Arizona v. California*, 373 U.S. at 598, treating executive order reservations in the same way as those established by treaty. *See also United States v. Dion*, 476 U.S. 734, 745 n.8 (1986); *Antoine v. Washington*, 420 U.S. 194, 197-98 (1975); *United States v. Pelican*, 232 U.S. 444, 445 (1914); *Ex parte Wilson*, 140 U.S. 575, 576-77 (1891). Indeed, the Court long ago upheld the President's power, nowhere granted or regulated by Congress, to withdraw public lands from private acquisition when it seemed to him wise. *United States v. Midwest Oil Co.*, 236 U.S. at 469-71, 483.

The acquisition of land, as an inherently executive function, falls outside the scope of the nondelegation doctrine which has only been invoked to invalidate delegations of Congress' *lawmaking* functions. *See Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). The purpose to be served by this doctrine [9] does not warrant its application outside that context.

Schechter illustrates the limits of the doctrine. The National Industrial Recovery Act of June 16, 1933, ch. 90, 48 Stat. 195, struck down in *Schechter*, would have fundamentally changed the form of American government through wholesale transfer of genuine *legislative* functions to private industrial groups and the President. Under that Act, Congress delegated to trade groups for each set of industries in the country the right to draft "codes of fair competition" imposing minimum wages, quality standards, trade practices, labor rules, industrial safety prac-

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[9] *See Loving*, slip op. at 8-9 (purpose of the doctrine is to give effect to the separation of powers, and ensure that Congress, as the "branch most capable of responsive and deliberative *lawmaking*," not forsake those duties without appropriate standards for their exercise) (emphasis supplied).

tices and the like. These codes, if approved by the President, would have the force of laws and carry criminal penalties. 295 U.S. at 521-26, 27. The Court held the Act to be an unconstitutional delegation of congressional power because it left the authority to *draft laws enforced by criminal sanction* to private persons, without any statement defining the specific objectives that the codes were to address other than "fair competition," 295 U.S. at 529-31, and without any review by a judicial body. *Id.* at 540.[10]

Schechter and *Panama Refining*[11] stand in sharp contrast to the authority provided to the Secretary under Section 5. Both cases involved the enactment of rules or standards that govern the rights and liabilities of persons —a legislative function. In contrast, Section 5 involves no delegation of authority to enact law or to regulate private conduct. It does nothing more than authorize the Secretary to acquire lands from willing sellers or donors pursuant to the IRA, which is an inherently executive function that simply does not implicate the nondelegation doctrine. Thus, the statute is plainly constitutional. Indeed, if a delegation to Indian tribes of regulatory author-

[10] A similar problem was presented by the part of the statute at issue in *Panama Refining* where again, Congress delegated to the President the authority to develop *laws* that would prohibit some shipments of petroleum in interstate commerce, the violation of which gave rise to criminal penalty. 293 U.S. at 414-15.

[11] Like *Schechter* and *Panama Refining*, other cases in which this Court has considered the nondelegation doctrine involved executive creation of rules or standards that govern the rights or liabilities of private persons, such as criminal laws or tax codes. Even as to these cases, the Supreme Court has, since 1935, rejected each and every nondelegation doctrine challenge. *See, e.g., Loving*, slip op. at 23, 25 (promulgation of factors that warrant the death penalty in military court martials); *Touby v. United States*, 500 U.S. 160, 162-64, 167 (1991) (making manufacture of a specified drug criminal); *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 214-15, 224 (1989) (imposing user fees or taxes); *American Power & Light Co.*, 329 U.S. at 97, 104-06 (circumstances for dissolution of public utility holding company); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 401, 404-11 (1928) (raising tariffs).

ity that is enforceable by federal criminal sanction approved in *Mazurie* does not violate the nondelegation doctrine, certainly a statute authorizing the Secretary of the Interior—an Executive branch official with broad recognized authority in Indian affairs—to acquire land for Indians, a typical executive function, does not do so.

II. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS FROM THIS AND OTHER COURTS, WHICH HAVE CONSISTENTLY RECOGNIZED THE VALIDITY OF SECTION 5 OF THE IRA.

An unbroken line of judicial authority has given effect to Section 5 and upheld the Secretary's authority to acquire lands for Indians in accord with the purposes of the IRA. When this section was before the Court in 1973, the Court relied upon Section 5 as authority for the Secretary to lease Forest Service lands *outside* a reservation to assist a tribal business enterprise—a ski resort—"as anticipated by sections 476 and 477" of the IRA. *Mescalero Apache Tribe*, 411 U.S. at 146, 157. The Court further held that as a result of the express terms of Section 5, the lands so leased were immune from state property taxes. *Id.* at 158.

The Secretary's authority to take land in trust for Indians under this statute has been upheld in every other case in which state or local governments or others have attacked its exercise. *Chase v. McMasters*, 573 F.2d 1011 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978), a decision from the Court of Appeals for the Eighth Circuit, not overruled by the court below, *rejected* a city's claim that the Secretary lacked authority to accept land into trust that was already owned by an individual Indian in fee and located within city boundaries. In so doing, the court relied on this Court's decisions in *Seber* and *Mescalero Apache Tribe* to determine the scope of the Secretary's authority under Section 5 and concluded that by that section, Congress "authorized the Secretary to acquire land for Indians," and that the Secretary had *not* "exceeded

his delegated authority" when he accepted the land for placement into trust. *Id.* at 1016.

Similarly, the Court of Appeals for the Eleventh Circuit, in rejecting a state's suit to divest land of its trust status, *State of Florida v. United States Dep't of the Interior*, 768 F.2d 1248, 1252 (11th Cir. 1985), found "there can be no doubt that there was statutory authority for the Secretary's decision to take the land in trust." The court considered the section in the context of other sections of the Act, as well as its overall purposes, *id.* at 1255-56 (citing 25 U.S.C. §§ 461, 462, 464), and concluded that because "the decision to acquire a particular tract of land would involve a myriad of factors," Congress necessarily vested the Secretary with broad discretion, and that the delegation of such discretionary authority was entirely consistent with established precedent. *Id.* at 1256-57.[12]

III. THE EIGHTH CIRCUIT VIOLATED FUNDAMENTAL PRINCIPLES OF CONSTITUTIONAL JURISPRUDENCE WHEN IT DECLARED SECTION 5 UNCONSTITUTIONAL BY EXAMINING IT IN THE CONTEXT OF A HYPOTHETICAL AND REFUSED TO ADDRESS AN ISSUE THAT MIGHT HAVE OBVIATED THE CONSTITUTIONAL QUESTION.

Even assuming, *arguendo* that Section 5 can be said to raise a nondelegation doctrine issue, the IRA contains the necessary standards. The court of appeals reached a contrary conclusion by examining the statute by reference to a hypothetical purchase of the "Empire State Building . . . for a tribal chieftain as a wedding present." Pet. App. at 7a. By making its ruling turn on an imagined acquisition, rather than the particular facts of the case, the court disregarded the fundamental rule that "[t]he delicate power of pronouncing an Act of Con-

[12] To the same effect, *see City of Sault Ste. Marie*, 532 F. Supp. at 162; *City of Tacoma*, 457 F. Supp. at 345-46. *Accord United States v. 29 Acres of Land*, 809 F.2d 544, 545 (8th Cir. 1987); *Langley v. Edwards*, 872 F. Supp. 1531, 1536 n.5 (W.D.La. 1995).

gress unconstitutional is not to be exercised with reference to hypothetical cases. . . ." *United States v. Raines*, 362 U.S. 17, 22 (1960).

The court also violated the "fundamental rule" that "[p]rior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for the decision," *Jean v. Nelson*, 472 U.S. 846, 854 (1985) (internal quotations and citations omitted), by declining to decide whether a Secretarial decision on a trust land acquisition is judicially reviewable. Resolution of that issue might well have cured any perceived infirmity of the statute under the nondelegation doctrine, as this Court has upheld broad delegations of congressional power where judicial review was available. *See American Power & Light Co.*, 329 U.S. at 105.

IV. SECTION 5 IS CONSTITUTIONAL AS THE IRA, ITS LEGISLATIVE HISTORY, JUDICIAL CONSTRUCTION, AND ADMINISTRATIVE PRACTICE ESTABLISH STANDARDS DEFINING THE SCOPE OF THE SECRETARY'S AUTHORITY.

When examined in the context of the IRA, its legislative history, judicial construction and the administrative practice, it is clear that Section 5 is constitutional. The acquisitions authorized by Section 5 may only occur by "purchase, relinquishment, gift, exchange, or assignment" which Congress directed be made "for the purpose of providing land for Indians . . . pursuant to this Act." Thus, Section 5 authorizes the Secretary to acquire lands that are needed for Indians to achieve the IRA's statutory purposes, which are set forth not only in Section 5, but the other sections of the IRA to which Section 5 expressly refers.

The purposes of the IRA have often been described by this Court. They are "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically," *Mancari*, 417 U.S. at 542; *Fisher v. District Court*, 424

U.S. 382, 387 (1976), to restore stability to Indian communities, *United States v. John*, 437 U.S. 634, 645-46 (1978), and to promote Indian economic development. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 n.5 (1987); *Mescalero Apache Tribe*, 411 U.S. at 151-52.

In adopting the Act, Congress recognized that tribal self-determination and economic self-sufficiency could not be achieved unless tribes had lands that were adequate to support the activities necessary to achieve these goals. Congress knew the history of the Indian land losses,[13] and fully intended to reverse the policy that had produced those losses.[14] Thus, Congress in Section 5 was acting, and intended to act, well within its traditional role of according the Secretary broad authority in the field of Indian affairs—in this case discretionary power to acquire land for Indians pursuant to the IRA.

If there were any doubt about the standards governing the Secretary's authority under Section 5, it is answered by applicable Interior Department regulations which further define the Secretary's power and which have since been ratified by Congress. Consistent with the purposes of the IRA, the regulations recite that land may be acquired in trust for a tribe or its members when the land

[13] *See* 78 Cong. Rec. 11726, 11732 (1934) (statements of Rep. Howard, Chairman of the Committee on Indian Affairs); *see also* Memorandum of Commissioner Collier on the purposes of the pending bill, printed in *Hearing before the Senate Committee on Indian Affairs on S. 2755*, 73rd Cong., 2d Sess. 17 (1934).

[14] To do so, Congress provided, in seven sections of the IRA, a series of measures to end the loss of Indian lands, and restore to tribes the land base necessary to achieve the goals of the Act. Thus, in addition to authorizing the Secretary to acquire land for Indians, 25 U.S.C. § 465, the Act ended the policy of allotment of reservation lands, 25 U.S.C. § 461, extended the trust status of restricted lands indefinitely, 25 U.S.C. § 462, restored unallotted lands to tribal ownership, 25 U.S.C. § 463, and authorized voluntary exchanges of land from allottees to tribes. 25 U.S.C. § 464. The Act further allowed the Secretary to establish new Indian reservations with newly acquired trust lands or add those lands to existing reservations. 25 U.S.C. § 467.

is within or adjacent to the reservation, "when the tribe already owns an interest in the land," or when acquisition "is necessary to facilitate tribal self-determination, economic development, or provide Indian housing." 25 CFR § 151.3(a).[15] In connection with any such acquisition—whether within or outside the reservation—the Secretary is further required to consider a series of enumerated factors.[16]

The regulations show the intelligible boundaries on the Secretary's exercise of discretion under Section 5 and provide a level of specificity far beyond that needed to satisfy the nondelegation doctrine. *See Lichter v. United States*, 334 U.S. 742, 771, 773-74, 776-86 (1948) (factors provided by agency regulations); *Motor Vehicle*

[15] The regulations were formally published in the Code of Federal Regulations on September 18, 1980, 45 Fed. Reg. 62036, and amended on June 23, 1995, 60 Fed. Reg. 32874. Another amendment on judicial review was made this year. 61 Fed. Reg. 18082 (April 24, 1996).

[16] These include the tribe's need for the land, the purposes for which it will be used, 25 CFR §§ 151.10(b), (c), (h); 151.11(a), and the tax and jurisdictional impact that the trust acquisition would have on the state and local governments. *Id.* at §§ 151.10(e), (f); 151.11(a). Notice must be given to state and local governments with an opportunity to comment. *Id.* at § 151.10. If the land is located outside the tribe's reservation additional requirements apply. The Secretary will consider the distance of the parcel from reservation boundaries and "as the distance between the . . . reservation and the land to be acquired increases," "greater scrutiny [is given] to the tribe's justification of anticipated benefits" and more weight to concerns expressed by state and local governments. *Id.* at § 151.11(b), (d). If the off-reservation land is to be used for business purposes, the tribe must prepare a business plan. *Id.* at § 151.11(c). The Secretary has denied applications that failed to meet these requirements. *E.g., Miami Tribe of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs*, 28 IBIA 52 (June 8, 1995), *reported in* 22 Ind.L.Rep. 7097 (Dec. 1995) (proposed acquisition too far from the tribe's other lands); *McAlpine v. Muskogee Area Director, Bureau of Indian Affairs*, 19 IBIA 2 (Oct. 10, 1990), *reported in* 17 Ind.L.Rep. 7100 (Nov. 1990).

Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41-42 (1983) (agency practice relevant). If there were any remaining questions about the standards governing the Secretary's exercise of that authority, the availability of judicial review of Secretarial decisions on trust land applications has obviated them. *See* 61 Fed. Reg. 18082 (April 24, 1996); *cf. American Power & Light Co.*, 329 U.S. at 105.[17] If the statute were viewed as insufficiently definite, the Secretary's regulations should be given "controlling weight." *Nationsbank of North Carolina, N.A. v. Variable Life Ins. Annuity Co.*, 513 U.S. ——, 130 L.Ed.2d 740, 748 (1995) (internal quotations and citations omitted).

V. CONGRESS, BY STATUTES ENACTED SINCE THE IRA, HAS EXERCISED THE OVERSIGHT NECESSARY TO ENSURE THAT SECTION 5 IS IMPLEMENTED CONSISTENT WITH CONGRESSIONAL INTENT.

Congressional oversight during the 60 years that Section 5 has been in effect has served to ensure that the Secretary's authority under Section 5 of the IRA does not exceed Congress' intent. Congress has limited the application of Section 5 where it deemed such limitations appropriate. In both the Act as originally adopted, and in subsequent statutes, Congress expressly defined the tribes to which Section 5 is, and is not, available.[18]

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[17] Amici concur in the Petitioners' request that given this new rule, and this Court's intervening decision in *Loving*, the decision of the court of appeals be vacated, with instructions to remand to the Secretary for reconsideration of the trust application in light of the new rule. As this Court has consistently held, agency regulations—including new rules—are entitled to considerable deference. *See Smiley v. Citibank, N.A.*, No. 95-860, slip op. at 3-5, 64 U.S.L.W. 4399, 4401 (U.S. June 3, 1996) (requiring deference to an agency regulation interpreting a 100-year old statute; that the regulation was recently promulgated in response to litigation, including the suit at issue before the Court, was irrelevant).

[18] The original Act limits its application by providing that no part of funds appropriated to purchase lands for Indians shall be used to acquire land for the Navajo Tribe outside its reservation. 25 U.S.C. § 465. In 1993, while providing a land base for the Catawba Tribe, Congress expressly made 25 U.S.C. § 465 inapplicable to that Tribe. *See* 25 U.S.C. § 941j(m). *Cf.* ns. 19-20 *infra*.

Likewise, when Congress adopted the Indian Gaming Regulatory Act in 1988, it limited the extent to which trust land could be acquired by tribes after October 17, 1988 for purposes of gaming, by requiring the consent of the State Governor for any such trust acquisition. 25 U.S.C. § 2719(b)(1)(A).

Significantly, Congress has imposed these additional requirements, or restricted Section 5 in specific circumstances *without* otherwise altering the availability of Section 5 and without altering the manner in which the Secretary and the courts have construed its scope. Indeed, Congress has, in other recent statutes, deliberately chosen to extend Section 5 to certain tribes not previously covered by it.[19] Congress has also expressed its satisfaction with the Secretary's regulations governing trust land acquisitions by enacting laws which, in the text of the statute, expressly refer to those regulations.[20]

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[19] By the Act of January 12, 1983, Pub. L. No. 97-459, § 203, 96 Stat. 2517, *codified at* 25 U.S.C. § 2202, Congress extended Section 5 to tribes that had not organized under the IRA. By statutes passed in 1988, Congress made clear its intent that Section 5 be available to the Yakima Indian Nation and the Yurok Tribe. Acts of November 1, 1988, Pub. L. No. 100-581, § 213, 102 Stat. 2941, and May 24, 1990, Pub. L. No. 101-301, § 1(a)(3), (b), 104 Stat. 206, *codified at* 25 U.S.C. § 608(c) (Yakima); Act of October 31, 1988, Pub. L. No. 100-580, § 2, 102 Stat. 2925, *codified at* 25 U.S.C. § 1300i-1(c)(3)(A) (Yurok). In 1994, Congress made Section 5 available to two newly-recognized Indian tribes. Act of October 31, 1994, Pub. L. No. 103-434, § 204, 108 Stat. 4534, *codified at* 25 U.S.C. § 1300*l*-2(a); Act of November 2, 1994, Pub. L. No. 103-454, § 305, 108 Stat. 4794, *codified at* 25 U.S.C. § 1300m-3.

[20] One example is the Puyallup Land Settlement Act, *see* n.1, *supra*, Act of June 21, 1989, Pub. L. No. 101-41, § 5, 103 Stat. 86, *codified at* 25 U.S.C. § 1773c. *See also* Mohegan Nation Settlement Act of October 19, 1994, Pub. L. No. 103-377, § 5, 108 Stat. 3504, *codified at* 25 U.S.C. § 1775c.

As these subsequent statutes show, Congress is aware of the scope of Section 5 and has deliberately taken measures to ensure that the Secretary's implementation of that Act is consistent with congressional intent. Congress has further reconfirmed its intent that the law remain in effect and available to fulfill congressional policy for Indians. Thus, the construction given this statute by the Secretary and Congress demonstrates that the statute, to the extent it is a delegation of legislative authority at all, is limited and contains intelligible standards from which the boundaries of the Secretary's exercise of discretion can be discerned—as required by the nondelegation doctrine.

CONCLUSION

The writ of *certiorari* should be granted, and the decision below either reversed or vacated and remanded to the Secretary for consideration in light of the Secretary's recent rule and this Court's decision in *Loving v. United States*.

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OCTOBER TERM, 1995

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Petitioners,

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STATE OF SOUTH DAKOTA
AND
CITY OF OACOMA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
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BRIEF *AMICI CURIAE* OF THE JICARILLA APACHE TRIBE, THE PUEBLO OF LAGUNA AND THE PUEBLO OF SANTA ANA IN SUPPORT OF PETITIONERS

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BRIEF *AMICI CURIAE* OF THE JICARILLA APACHE TRIBE, THE PUEBLO OF LAGUNA AND THE PUEBLO OF SANTA ANA IN SUPPORT OF PETITIONERS

The Jicarilla Apache Tribe, the Pueblo of Laguna and the Pueblo of Santa Ana ("New Mexico Tribes" or "Tribes") respectfully submit this brief in support of the petition of the United States Department of the Interior, *et al.*, for a writ of certiorari to review the judgment of

the United States Court of Appeals for the Eighth Circuit in this case. The parties to this case have all consented to the New Mexico Tribes filing this brief, as indicated in letters filed with the Court.

INTEREST OF AMICI

The traditional lands of the Jicarilla Apache Tribe extended across nearly 50 million acres in New Mexico and Colorado.[1] The Tribe now is located on approximately 870,000 acres in north central New Mexico,[2] of which about 95,000 acres were taken into trust pursuant to Section 5 of the Indian Reorganization Act ("IRA"), 25 U.S.C. §465.[3] The Tribe also has recently acquired a parcel of 32,069.8 acres, for which an application under Section 5 is currently pending.[4] The Pueblo of Laguna is comprised of six villages in the Rio San Jose Valley, west of Albuquerque.[5] The Pueblo was recognized through Spanish land grants in the late seventeenth century, but the land grants were not officially confirmed and patented by the United States until 1906, and there were still land disputes with non-Indian settlers after that time.[6] The Pueblo's land now consists of approximately

[1] Veronica E. Velarde Tiller, TILLER'S GUIDE TO INDIAN COUNTRY (1996), at 444.

[2] *Id.* at 443.

[3] The El Poso Ranch (26,421.38 acres) was placed in trust in 1986 and added to the Jicarilla Reservation in 1988; the Horse Lake Ranch (54,843.44 acres) was placed in trust and added to the reservation in 1988; and the Willow Creek Ranch (14,138,983 acres) was placed in trust in 1995 and is in the process of being added to the reservation.

[4] The Chama Land and Cattle Co. Property, purchased by the Tribe in July 1995.

[5] Tiller, *supra* note 1, at 446.

[6] *Id.* at 446-47.

530,000 acres, of which about 65,000 acres were taken into trust under Section 5 of the IRA.[7] The Pueblo of Santa Ana, which has a history similar to that of Laguna, is located just north of Albuquerque on approximately 60,000 acres,[8] of which about 400 acres were taken into trust pursuant to Section 5.[9] All of the land taken into trust under Section 5 was purchased with tribal funds, at no expense to the federal government.

All of the land purchased by the New Mexico Tribes and placed in trust under Section 5 of the IRA is regarded by the Tribes as part of their aboriginal territory. By having this land placed into trust the Tribes intended to safeguard against losing the land again in the future, precisely as contemplated by the IRA, and indeed as remarked upon by the dissent in the Eighth Circuit decision:

> Discontent with the allotment policy caused Congress to enact the Indian Reorganization Act of 1934, 25 U.S.C. §461-479, to stem the loss of Indian lands and to assist Indians in acquiring land

[7] The Majors Ranch (27,196.49 acres), placed in trust in 1976 and formally added to the Pueblo of Laguna Reservation in 1980; the Sanchez Ranch (8,848.16 acres), placed in trust and added to the reservation in 1981; the Eidson Ranch (6,898.72 acres), placed in trust in 1983 and added to the reservation in 1984; the Polocarpio Armijo Ranch (2,245.48 acres), placed in trust in 1983 and added to the reservation in 1984; and the Harrington Ranch (20,723.17 acres), placed in trust in 1987 and added to the reservation in 1988.

[8] Tiller, *supra* note 1, at 460.

[9] The Leonard Property (300.15 acres) was placed in trust in 1981 and added to the reservation in 1986; the First American tracts (132.008 acres) were placed in trust and added to the reservation in 1988; the Thompson tract (1.11 acres) and the Waters tract (2.50 acres) were placed in trust in 1994 but have not yet been added to the reservation.

> adequate for self-support. *See Chase v. McMasters*, 573 F.2d 1011, 1016 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978). The purpose of the Act was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 93 S.Ct. 1267, 1272, 36 L.Ed.2d 114 (1973) (quoting H.R. Rep. No. 1804, 73d Cong. 2d Sess., 1 (1934)). The Act rejected assimilation as a goal and instead sought Indian self-determination. The portion of the Act under attack here, 25 U.S.C. §465, specificially addresses the problem of the loss of Indian land and authorizes the Secretary to acquire land in trust "for the purpose of providing land for Indians."

App. 20a-21a.[10] *See also Mescalero Apache Tribe*, 411 U.S. at 151 ("Unquestionably, the [IRA] reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands").

The Tribes also intended to ensure tribal sovereignty and jurisdiction over this land by having it taken into trust. *See, e.g., Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505, 511 (1991) (finding that tribal trust land was Indian country for purposes of tribal sovereign immunity). Moreover, this land has provided the Tribes with resources and opportunities for tribal employment, and has generated tribal revenues which have been used not for "wedding presents" for "tribal chieftains," App. 7a, but for sorely needed government services, also as contemplated by the IRA. *Mescalero Apache Tribe*, 411

[10] References to the Eighth Circuit's decision are cited to the appendix ("App.") of the United States' petition for a writ of certiorari ("U.S. Pet.").

U.S. at 151-52. After 60 years of land acquisitions under Section 5 of the IRA, the Eighth Circuit now finds the statute to be unconstitutional, based on a theory – the nondelegation doctrine – which this Court has not endorsed for 60 years. Unless this Court grants certiorari in this case, therefore, all of the Tribes' investment in Section 5 will be placed in jeopardy, by a decision which marks a radical departure from this court's established jurisprudence.[11]

SUMMARY OF ARGUMENT

As noted by the government in its petition, the IRA is one of the most important statutes affecting tribes, and Section 5 is one of the key provisions in the statute, U.S. Pet. at 15-16. Tribes, including the New Mexico Tribes, have used Section 5 to regain tribal lands and have developed these lands to provide tribal employment opportunities and revenue, which in turn strengthens tribal sovereignty and self-determination, thus achieving the goals of the statute. The Eighth Circuit's holding that Section 5 is unconstitutional, if followed by other courts, would put an end to this system without leaving any alternative in its place. Allowing the Eighth Circuit's decision to stand also would threaten the status of existing trust lands that have been acquired under Section 5; since these lands do not exist in isolation, moreover, but have been integrated into the rest of the tribes' lands, the adverse effects of the Eighth Circuit's decision would extend to entire reservations.

[11] The New Mexico Tribes do not make any concessions as to the precedential effect of the Eighth Circuit's decision, but recognize that states and other parties may rely on the decision to challenge both existing and pending trust acquisitions under Section 5.

The Eighth Circuit decision also is in direct conflict with decisions of this Court regarding the nondelegation doctrine. In construing Section 5, the Eighth Circuit failed to consider the provision in light of its legislative history, factual background and statutory and regulatory context. The court also failed to recognize the importance of allowing Congress flexibility in delegating legislative authority; such flexibility enables Congress to rely on administrative bodies to implement the details of its policies. In striking down the Section 5 delegation, which is no broader than many others upheld by this Court, the Eighth Circuit's decision represents a radical departure from established Supreme Court precedent. The Eighth Circuit also failed to abide by long-standing principles of statutory construction in reaching its decision.

ARGUMENT

I.

THE EIGHTH CIRCUIT'S DECISION, IF ALLOWED TO STAND, WOULD HAVE ADVERSE IMPACTS ON TRIBAL SOVEREIGNTY, SELF-DETERMINATION AND ECONOMIC DEVELOPMENT.

From 1881, after the era of treaty making with Indian tribes, to 1934, the end of the allotment period, Indian lands decreased from approximately 156 million acres to 48 million acres.[12] This drastic diminishment of Indian lands was in large part the result of the federal government's allotment policies, which ended with passage of the IRA. *See* App. 20a. For the past 60 years, by proceeding under Section 5 of the IRA, Indian tribes

[12] Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.), at 138.

(including the New Mexico Tribes) have managed to regain some of their lost lands, and with them to strengthen tribal sovereignty and self-determination; it is this statute which the Eighth Circuit now finds unconstitutional.

Under Section 5 of the IRA, the Jicarilla Apache Tribe has acquired trust land which the Tribe uses to develop and conserve wildlife and range resources.[13] The wildlife management activities of the Tribe employ approximately 20 individuals on the reservation, including a wildlife biologist, technicians, enforcement personnel and park maintenance personnel. The Tribe also uses part of the land as a Youth Ranch to teach young tribal members about wildlife, soil and water conservation, farming and ranching; for example, the Tribe is conducting several grazing experiments through the Youth Ranch program to enhance the grazing resources within the reservation. The Tribe coordinates its wildlife management functions with its parks and recreation program in order to attract hunters, fishermen, and other tourists to the reservation. Hunting and tourism also support the operation of the Jicarilla Inn, a motel which is located on the reservation, owned by the Tribe, and managed and staffed by tribal members. The Tribe receives between $250,000 and $300,000 in revenue from its wildlife program each year. Part of the revenue is used to further develop the wildlife resources of the Tribe; the remainder helps fund tribal governmental services on the reservation. The

[13] The Jicarilla Apache Reservation was specifically identified as one of the allotted areas to be protected under the IRA. *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Committee on Indian Affairs*, 73d Cong., 2d Sess., at 29 (1934).

Jicarilla Apache Tribe is also evaluating some Section 5 land for the development of homesites and grazing land for tribal members.

The Pueblo of Laguna uses virtually all of the land acquired under Section 5 for grazing, on which many of the Pueblo's members rely for their livelihood. The land also contains significant numbers of elk, deer, and antelope. The Pueblo has been developing a wildlife conservation program to enhance the number and quality of the game, and derives revenue from the game resources by selling hunting permits to members and non-members. The revenue generated from the hunting permits in part funds further conservation and game improvement activities of the Pueblo and in part funds other tribal governmental services provided on the reservation. In addition, the Pueblo currently is evaluating portions of its reacquired land for use as a commercial firewood enterprise and for lease for the construction of a cellular transmission tower, in an effort to provide additional revenues to the Pueblo.

The Pueblo of Santa Ana also uses part of its Section 5 land for grazing. In addition, part of the acquired land, along with land acquired through an act of Congress,[14] has been developed as a championship 27-hole golf course, which hosts several tournaments each month in addition to its daily operations. This golf course was not in existence at the time the Pueblo purchased the land, *see* App. 7a, but on the contrary was planned, designed and developed by the Pueblo in order to produce revenue and consequently services for the benefit of the Pueblo and its members. Other land that the Pueblo hopes to place into trust under Section 5 contains a four-star restaurant (again, planned and developed by the Pueblo) which is owned by the Pueblo and which,

[14] Act of Oct. 21, 1978, Pub. L. No. 95-498, 92 Stat. 1672.

together with the Pueblo's golf course, attracts patrons from nearby Albuquerque and provides revenue to the Pueblo.

Section 5 thus has been used by the New Mexico Tribes as a means of reacquiring land for their reservations, and in particular aboriginal land, precisely as Congress contemplated when enacting the IRA. Indeed, Section 5 is the only means, short of obtaining specific legislation, for Tribes to reacquire lost trust lands, since further treaty making was prohibited in 1871,[15] as was the establishment of reservations by executive order in 1919.[16] Cases brought in Claims Court are for money damages only.[17]

The land acquired by the Tribes under Section 5 has been incorporated into the Tribes' reservations, into their economic development plans and into their governmental structures. The Tribes have put this land to productive uses, such as hunting and grazing, have developed the land for recreation and tourism and have provided new opportunities for tribal businesses and employment, thus contributing to tribal self-sufficiency and improving economic conditions on the reservations. The resulting enhancement of tribal sovereignty and self-determination is a goal not only of the IRA but also one supported by

[15] Appropriations Act of March 3, 1871, 25 U.S.C. §71.

[16] Appropriations Act of June 30, 1919, 43 U.S.C. §150. *See also* 25 U.S.C. §§211, 398d.

[17] *See generally* Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753-854 (1992). A few eastern tribes have acquired land through land claim cases, based generally on the lack of federal consent to treaties with eastern states, but these are limited in number and were settled by specific legislation. *See* Robert N. Clinton *et al.*, AMERICAN INDIAN LAW (3d ed. 1991), at 738-40.

the President, *see, e.g.,* Memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments," 59 Fed. Reg. 22,951, as well as by presidents before him, *e.g.,* Statement by the President, 19 Weekly Comp. Pres. Doc. 98 (January 24, 1983), and by other acts of Congress, *e.g.,* Indian Self-Determination and Education Assistance Act, 25 U.S.C. §450 *et seq.* *See also Mescalero Apache Tribe,* 411 U.S. at 152 (quoting H.R. Rep. No. 1804, 73d Cong. 2d Sess., 1 (1934)) (a major purpose of the IRA was to "rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism"). Moreover, because these Section 5 lands have been integrated into the Tribes' reservations, including into their regulatory, taxing and other governmental structures, disruptions to the status of these lands would not be confined to the individual parcels but would affect the reservation's life and economy as a whole.

Section 5 also provides a means for removing some of the "checkerboarding" on Indian reservations. Because of the allotment of tribal land, discussed above, and subsequent alienation of many tracts, much of Indian country has alternating areas of tribal trust land or other Indian land and private fee land. This checkerboarding of Indian land has created complex jurisdictional issues in many areas. *See, e.g., United States v. Calladitto,* 19 ILR 3057 (D.N.M. 1991) (criminal jurisdiction); *Oklahoma Tax Comm'n v. Sac and Fox Nation,* ___ U.S. ___ , 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993) (taxation); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation,* 492 U.S. 408 (1989) (zoning). *See also* 56 Fed. Reg. 64,876, 64,878 (1991) (in which EPA notes its desire to avoid "a 'checkerboard'

system of regulation," with "the difficulties of assuring compliance with water quality standards when two different sovereign entities are establishing standards for the same small stream segments"). Consolidation of Indian lands through Section 5 helps to alleviate some of these problems.

Land is essential to the economic viability of tribes, which is all the more important at this time of decreases in the federal budget and cuts in federally funded tribal programs and the Bureau of Indian Affairs. In addition, loss of trust status would mean the imposition of a tax burden on tribes which could render uneconomic many of the uses of trust lands described above.[18] Tribes relied upon the trust status of Section 5 lands in developing these various uses of the land. Moreover, land acquired by the New Mexico Tribes under Section 5 comprises only 160,000 acres out of an estimated 9 million acres acquired in total under Section 5 during the past 60 years, U.S. Pet. at 17, all of which is placed in jeopardy by the Eighth Circuit decision.

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[18] Any concern as to the tax consequences to the state of removing land from state tax rolls was specifically addressed by Congress in enacting the IRA. In hearings before the Senate, the BIA pointed out that the recently enacted Johnson-O'Malley Act, 25 U.S.C. §452 (1934), established a system for reimbursing state and county governments for the cost of services they perform for Indians, in lieu of taxation. *To Grant Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S.2755 and S.3645 Before the Senate Committee on Indian Affairs,* 73d Cong., 2d Sess., at 160 (1934). In addition, §151.10(e) of the Department of the Interior's regulations under Section 5, 25 C.F.R. §151.10(e), requires the Secretary to consider "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls."

II.

THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH SUPREME COURT PRECEDENT REGARDING THE NON-DELEGATION DOCTRINE AND MATTERS OF STATUTORY CONSTRUCTION AND JUDICIAL RESTRAINT.

This Court, in *Mistretta v. United States,* 488 U.S. 361, 372-73 (1989) (upholding delegation to set sentencing guidelines), set forth the three criteria for a delegation by Congress of legislative authority to be constitutional:

> this Court has deemed it "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." [Citing *American Power & Light Co. v. SEC,* 329 U.S. 90, 105 (1946).]

The Eighth Circuit found that Section 5 of the IRA did not satisfy the third requirement of this test because "there are no perceptible 'boundaries,' . . . within the four corners of the statutory language that constrain this delegated authority." App. 7a.

This finding pinpoints a major error in the panel's decision: the court should have looked beyond the "four corners of the statutory language" to the historical context and legislative history and purposes of the IRA as a whole to define the boundaries of the Section 5 delegation. *American Power & Light,* 329 U.S. at 104 (stating, in upholding SEC's authority to dissolve holding companies, "these standards need not be tested in isolation. They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear.").[19] The Eighth

[19] Section 5 itself provides more standards than the majority acknowledges: it specifies the rights that may be acquired ("any

[footnote continued]

Circuit's failure to look at the delegation in context thus marks a significant departure from Supreme Court precedent, *see also Mistretta,* 488 U.S. at 376, n.10; *Thomas v. Union Carbide Agricultural Products Co.,* 473 U.S. 568, 593 (1985); *Federal Energy Admin. v. Algonquin SNG, Inc.,* 426 U.S. 548, 560 (1976); *Lichter v. United States,* 334 U.S. 742, 785-86 (1948), as well as conflicting with case law in its own circuit, *United States v. Garfinkel,* 29 F.3d 451, 458 (1994) ("standards are not, however, examined in isolation. . . . Rather, we examine the language of the statute; the purpose of the Act, along with its factual background; and the statutory context in which the standards appear."). *See also City of Sault Ste. Marie v. Andrus,* 458 F.Supp. 465, 473 (1978) (dismissing claim that IRA is an unconstitutional delegation of legislative power, based in part on legislative history of Act providing adequate standards).

Moreover, this Court has upheld many statutes with broad delegations of legislative authority, as pointed out by Judge Murphy in her dissent from the Eighth Circuit decision, App. 18a. As the Court said in *Mistretta,* 488 U.S. at 373,

> Until 1935, this Court never struck down a challenged statute on delegation grounds. After invalidating in 1935 two statutes as excessive delegations, see A.L.A. Schechter Poultry Corp. v. United

interest in lands, water rights, or surface rights to lands"); how they may be acquired ("through purchase, relinquishment, gift, exchange, or assignment"); and where they may be located ("within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased"). In addition, the Department of the Interior has promulated regulations which further define the scope of Section 5 authority. *See generally* 25 C.F.R. Part 51.

> States, . . . and Panama Refining Co. v. Ryan, . . . we have upheld, again without deviation, Congress' ability to delegate power under broad standards [citing numerous cases in which such delegations were upheld, and distinguishing *Schechter*, 295 U.S. 495, and *Panama Refining*, 293 U.S. 388].

(Citations omitted.) *See also Touby v. United States*, 500 U.S. 160, 165 (1991) (upholding expedited designations of controlled substances to avoid imminent hazards to public safety); *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 219 (1989) (upholding authority of Transportation Secretary to establish pipeline safety user fees).

The Eighth Circuit's decision, if allowed to stand, would also restrict the ability of Congress to "seek[ ] assistance from another branch" in implementing its policies, *Hampton v. United States*, 276 U.S. 394, 406 (1928) (upholding flexible tariff provision), even though this Court has held that:

> "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality . . . to perform its function." . . . Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers. . . . It is free to avoid the rigidity of such a system.

Yakus v. United States, 321 U.S. 414, 425-26 (1944) (upholding Emergency Price Control Act) (citations omitted). Indeed, this Court has specifically recognized "that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta*, 488

U.S. at 372. *Accord Touby*, 500 U.S. at 165; *Lichter*, 334 U.S. at 785; *Hampton*, 276 U.S. at 404-05. *See also Mistretta*, 488 U.S. at 377-79. As explained by the Court in *American Power & Light*, 329 U.S. at 105, "[t]he legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation." Our entire administrative system is based on an acknowledgement of the expertise and abilities of administrative bodies to address the details of implementing Congressional policies, which would be thwarted by the Eighth Circuit's decision.[20]

In addition, in reaching its decision the Eighth Circuit ignored certain basic principles of statutory construction and judicial restraint. At the same time as the court examined the boundaries placed on Section 5 within the narrowest confines of the statutory language, it construed the language of Section 5 itself as broadly as possible. App. 13a. This construction is in direct contravention of the long-established principle that statutes should be construed so as to avoid doubt as to their constitutionality. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986); *Garfinkel*, 29 F.3d at 455; *International Union, UAW v. OSHA*, 938 F.2d 1310, 1316 (D.C. Cir. 1991); *see also Mistretta*, 488 U.S. at 373 n.7. Moreover, it is a settled principle of Indian law that statutes are to be construed in favor of the Indians. *E.g., Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 174 (1973). Furthermore, as Judge Murphy

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[20] *See generally* Kenneth Culp Davis, ADMINISTRATIVE LAW TREATISE (3d ed. 1994), §2.6.

pointed out in dissent, App. 15a-16a (citing *Jean v. Nelson*, 472 U.S. 846, 854 (1985); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 157 (1984)), the Eighth Circuit unnecessarily reached a constitutional issue rather than addressing a jurisdictional issue, regarding the availability of judicial review under the Administrative Procedure Act, 5 U.S.C. §§701-706.

Finally, as the federal government has discussed in its petition, the Department of the Interior has promulgated a regulation providing an opportunity for judicial review before land is actually taken into trust under Section 5, 61 Fed. Reg. 18,082 (1996), reprinted at App. 64a-69a. In fact, the Jicarilla Apache Tribe currently has a Section 5 application pending under the Department's new rule (*see* note 4, *supra*). The availability of judicial review has a bearing on the constitutionality of a delegation, *Skinner v. Mid-America Pipeline*, 490 U.S. at 219 (citing *American Power & Light*, 329 U.S. at 105); *Garfinkel*, 29 F.3d at 459; App. 17a, and the Department's rule is yet one more factor weighing in favor of the constitutionality of Section 5.

CONCLUSION

For all the above reasons, the Court should grant the Department of Interior's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1995

UNITED STATES DEPARTMENT OF INTERIOR, ET AL.,

Petitioners,

v.

STATE OF SOUTH DAKOTA AND CITY OF OACOMA,

Respondents.

On Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF *AMICI CURIAE* OF THE CHEROKEE NATION OF OKLAHOMA, CHIPPEWA-CREE TRIBE OF THE ROCKY BOY'S RESERVATION, KENAITZE INDIAN TRIBE, MASHANTUCKET PEQUOT TRIBE, NATIONAL CONGRESS OF AMERICAN INDIANS, OGLALA SIOUX TRIBE, PAIUTE TRIBE OF UTAH, PRAIRIE ISLAND INDIAN COMMUNITY, ROSEBUD SIOUX TRIBE, SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA, SEMINOLE NATION OF OKLAHOMA IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

The Eighth Circuit found Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, which allows the Secretary of the Interior to take land into trust for Indians, to be an unconstitutional delegation of legislative authority. According to the Eighth Circuit's ruling, the Secretary has, for 60 years, been acting illegally in taking millions of acres of land into trust under § 465. Hence, in the Eighth Circuit, he could be precluded from taking any more land in trust. Furthermore, land already taken into trust could lose that status and become vulnerable to state and county taxation. If tribes or individuals were unable to pay their taxes – a very real possibility for many Indians who are just beginning to climb out of poverty – their lands could be quickly lost to foreclosure. Also, without trust status, it is possible that Indian lands could be lost through improvident sales or transfers. Finally, without trust status, the balance of tribal-state jurisdiction would be disturbed.

Amici Curiae are 10 federally recognized tribes and one national Indian organization. All *amici* tribes have had land taken into trust, have applications pending to do so, or may wish to file such petitions in the future. While not all *amici* reside within the jurisdiction of the Eighth Circuit, all are adversely affected by the precedent set by the decision. Although this case began as a dispute over a mere 91 acres of land, the ruling could potentially affect millions of acres of land and hundreds of tribes throughout the United States. Therefore, *amici* have a

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[1] Counsel for Petitioners and Counsel for Respondents have consented to the filing of the brief of *amici*. The consents are submitted for filing herewith.

substantial interest in having the United States Supreme Court review and reverse this devastating decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the Lower Brule Sioux Tribe purchased 91 acres of land in fee and requested the Secretary of the Interior to take that land in trust, pursuant to 25 U.S.C. § 465. The Secretary placed the land in trust and the State of South Dakota and City of Oacoma challenged that action on a variety of statutory and constitutional grounds.

The United States District Court for the District of South Dakota found that the United States had not waived its sovereign immunity with respect to the statutory claims and dismissed those claims for lack of jurisdiction. The court then rejected the constitutional claim. Ignoring the statutory claims, the Court of Appeals for the Eighth Circuit reversed the District Court's decision on the constitutional claim. Effectively gutting federal policy, the Eighth Circuit found that § 465 – the section authorizing the Secretary to take the land of the Lower Brule Sioux Tribe into trust – was an unconstitutional delegation of legislative authority.

Amici urge this Court to grant the United States' Petition for a *Writ of Certiorari* because of the extreme importance of this case and because the decision of the Eighth Circuit conflicts with Supreme Court precedent. The Eighth Circuit's decision frustrates the federal policy of promoting self-determination for Indian tribes through the acquisition of trust land. In reaching this decision, the Court of Appeals disregarded fundamental principles of judicial restraint established by this Court to avoid reaching constitutional issues

unless absolutely necessary. Also, the Court of Appeals ignored this Court's clear precedent on the non-delegation doctrine. In this regard, the court refused any attempt to construe § 465 so as to preserve its constitutionality; failed to understand that Congress fulfilled its legislative role by declaring policy; ignored all pertinent legislative history demonstrating Congress' intent in passing the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 and all regulations pointing to limitations on the delegation; and failed to properly consider the relevance of judicial review to the issue of constitutionality.

ARGUMENT

I. THIS CASE MERITS REVIEW BECAUSE THE EIGHTH CIRCUIT EVISCERATES A FUNDAMENTAL AND LONGSTANDING FEDERAL INDIAN POLICY OF MONUMENTAL IMPORTANCE TO THE WELFARE OF INDIAN PEOPLE

For centuries Indian tribes and Indian people have struggled to protect their land. Since first European contact they have been in conflict with states and European settlers seeking to take over Indian land. It has been a constant and hard fought battle to stave off this encroachment – a battle more often than not lost. Fortunately for Tribes, the United States today has a strong policy to increase and protect the Indian land base. The cornerstone of that policy is § 465 of the Indian Reorganization Act of 1934. 25 U.S.C. § 465 (1992). This statute, the only statute of its kind, allows the Secretary of the Interior to take land into trust for Indians. With the protection of trust status, the federal policy of promoting Indian

self-determination and self-sufficiency can be realized.[2] As history has shown however, without such protection, massive losses of Indian land and the very viability of Indian people are threatened.

From late in the nineteenth century until 1934, Congress experimented with a policy whereby it ceased to protect Indian land. This policy is known as allotment. *See* The General Allotment Act of 1887, 25 U.S.C. §§ 331 et. seq. The goal of allotment was to break up reservations and to apportion land to individual Indians to encourage their adoption of an agrarian lifestyle and assimilation into general American society. *See* Felix S. Cohen, Handbook of Federal Indian Law, 131-32 (1982 ed.).

Allotment was an abysmal failure. Because of that policy Indian people found themselves dispossessed of more than 90,000,000 acres of their land. *Cohen* at 138 (*citing* Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs, 73rd Cong., 2d Sess. 428-89 (1934)). As a result, Indian people suffered a "lamentable lowering of the[ir] social and economic status." 78 Cong. Rec. H11,725 (daily ed. June 15, 1934) (statement of Rep. Howard). As described in the *Meriam Report*[3], the overwhelming majority of Indian

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[2] *See* President Clinton, Address at Tribal Leaders Event (April 29, 1994), *reprinted in*, Bureau of Indian Affairs, U.S. Dep't of Interior, Bureau of Indian Affairs, vol. 18, no. 4 (1994) (stating that the United States is committed to a policy of self-determination for Indian tribes).

[3] Institute for Government Research, *The Problem of Indian Administration* (L. Meriam ed.) (Baltimore: The Johns Hopkins Press, 1928) (*Meriam Report*).

people were pauperized by allotment. Living in destitution, Indian people suffered some of the highest malnutrition and mortality rates, and the lowest levels of education and standard of living of any group in the United States. *See generally, Meriam Report.*

Admitting the terrible error of allotment, Congress ended that policy through the Indian Reorganization Act of 1934. 25 U.S.C. §§ 461-479. Learning a lesson from the allotment era, Congress recognized that there was a significant nexus between a sufficient land base and the economic and cultural survival of Indian tribes. Indians "have to have lands, or they will be paupers. . . . " 78 Cong. Rec. S11,135 (daily ed. June 12, 1934) (Statement of Sen. Wheeler). In order to provide Indians with an opportunity for survival, Congress made one of the central objectives of the IRA to reverse the land dispossession.

First, Congress stopped all further allotment. 25 U.S.C. § 461. Second, it extended indefinitely the trust period for allotted lands. 25 U.S.C. § 462. Then, it authorized the Secretary of the Interior to restore to tribal ownership any reservation lands that had not been allotted, and limited the sale or transfer of Indian land. 25 U.S.C. §§ 463-464. Finally, Congress enacted the provision at issue here "for the purpose of providing land for Indians." 25 U.S.C. § 465. This section is the only section which actually attempts to "undo the dramatic effects of the allotment years." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992).

Pursuant to § 465, the Secretary of the Interior has, for sixty years, taken millions of acres of land into trust for the benefit of Indians. The Eighth Circuit's ruling jeopardizes these acquisitions and threatens future trust acquisitions, thereby seriously impairing the federal government's entire policy of promoting Indian self-determination through land acquisition – an almost inviolate Congressional province. This Court "has never held unconstitutional an action by which Congress or the Executive has recognized or established Indian Country." *Cohen* at 42. *See, e.g., United States v. John*, 437 U.S. 634 (1978); *United States v. McGowan*, 302 U.S. 535 (1938).

If this infringement on federal policy is allowed to stand, the consequences will be disastrous. With a strong federal policy of protecting Indian land again in place, Indian tribes and Indian people have hope of strengthening their governments and developing their economies, which will, in turn, allow them to provide for themselves and their people and will allow their cultures to thrive. If the Eighth Circuit's decision is allowed to stand, however, the Secretary will lose power to take land in trust in the future and may be helpless to protect land already acquired under § 465 – whose trust status is likely to be questioned. If trust status is lost or if future acquisitions are prevented from being taken into trust, Indian land might be subject to alienation without Congressional approval[4], which could lead to overreaching by unscrupulous buyers and improvident losses of massive tracts

[4] Congress has always sought to protect Indian land against improvident alienation. *See* The Non-Intercourse Act, 25 U.S.C. § 177 (1834).

of land. Likewise, without trust status, the land could be subject to taxation – which, as Justice Marshall observed, "involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

Furthermore, tribal and state regulatory and adjudicatory jurisdiction over such land could be called into question. Trust status is a crucial factor in this Court's resolution of tribal-state disputes over jurisdiction. *See, e.g., Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556-57 (1832) (finding generally that Indian territory is territory over which the Indian nations have exclusive authority); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (finding that § 465 explicitly exempts land taken into trust from state taxation); *Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505 (1991) (finding that where land is validly set apart for Indians, Indian activities arising on that land are exempt from state taxation); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (finding that tribe had authority to tax mining activities on tribal trust land).

The very importance of this case to federal Indian policy and to tribes and Indian people calls for this Court's review.

II. BY PREMATURELY PASSING ON THE CONSTITUTIONALITY OF § 465 THE EIGHTH CIRCUIT VIOLATED ONE OF THIS COURT'S MOST FUNDAMENTAL RULES OF JUDICIAL RESTRAINT

The doctrine of judicial restraint is well-established under Supreme Court precedent. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass

on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1988). Consequently, where a case involves both constitutional and non-constitutional issues, a federal court must first consider potential non-constitutional grounds for its decision. *Jean v. Nelson*, 472 U.S. 846, 854 (1985).

Here, both statutory and constitutional issues were presented to the Eighth Circuit for review. The statutory claims included: whether sovereign immunity under the Quiet Title Act, 28 U.S.C. § 2409a, prohibited review of the Secretary's decision to take land into trust where that decision was challenged under the Administrative Procedure Act, 5 U.S.C. § 702; and whether sovereign immunity insulated the Secretary if he exceeded his authority in taking the land into trust. The constitutional issue was whether § 465 provided sufficient standards to constitute a lawful delegation of authority to the Secretary.

In blatant disregard of judicial restraint, the Eighth Circuit prematurely reached the constitutional question. The court stated:

> We doubt whether the QTA precludes APA review of agency action by which the United States acquires title. But given our conclusion that § 465 is an unconstitutional delegation of power, we need not decide this issue.

State of South Dakota and City of Oacoma v. United States Dep't of Interior, 69 F.3d 878, 881 n.1 (8th Cir. 1995), *App.*, 4a n.1.

Had the Eighth Circuit exercised proper judicial restraint, it would have first considered the jurisdictional or statutory arguments under the Quiet Title Act or

Administrative Procedure Act. Because the answers to these inquiries could have been dispositive,[5] it may have been unnecessary for the court to reach the constitutional question.

Additionally, in its haste to rule on the constitutional issue, the Eighth Circuit failed to recognize that under Fed.R.Civ.P. 19, it could and should have dismissed this case for lack of an indispensable party – the Lower Brule Sioux Tribe.[6] Given the gravity of the case to the Tribe and the court's duty to refrain from a constitutional ruling, the Eighth Circuit should have taken the steps necessary to protect the absent Tribe and considered the issue of the Tribe's joinder before reaching the constitutional issue. *Provident Tradesmens Bank*, 390 U.S. at 111 (finding that a Court of Appeals has an independent duty to protect the interests of absent parties).

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[5] The court could have concluded that the Secretary exceeded his power to take land in trust, that the decision was made without compliance with regulations, or that the decision was arbitrary and capricious, as the state initially charged.

[6] Rule 19 establishes a two prong test for determining whether a party is indispensable to a suit. Under the first prong, the court must determine whether a party is necessary. The court must then analyze under the second prong whether the facts and circumstances of the case demonstrate that a party is indispensable and in "equity and good conscience" the suit should be dismissed. *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 108 (1968).

The Tribe here is a necessary party due to its vested interest in the subject of this suit in that the subject of the suit is the disposition of its land. Also, the Tribe is indispensable due to the extreme prejudice to its interests caused by this suit. Because the Tribe is immune from suit, it cannot be joined and hence the suit should have been dismissed.

III. IN DECIDING THE CONSTITUTIONAL ISSUE THE EIGHTH CIRCUIT BLATANTLY DISREGARDED SUPREME COURT PRECEDENT REGARDING THE NON-DELEGATION DOCTRINE

A. In Direct Contravention Of Supreme Court Precedent, The Eighth Circuit Failed To Try To Preserve The Constitutionality Of § 465

Under the United States Constitution, Congress may not constitutionally delegate its legislative powers to another branch of the government. U.S. Const. art. I, § 8, cl. 3. This constitutional doctrine is known as the non-delegation doctrine. While under this doctrine, courts may, and have, struck down congressional statutes as unconstitutional, those instances are extraordinarily rare. Only twice in this Court's history, and not since 1935, has this Court found a statute unconstitutional under the non-delegation doctrine. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). Rather, in keeping with the general principle that courts should strive to construe statutes so as to preserve their constitutionality, *see Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988), this Court has found that the non-delegation doctrine should be employed as a canon of construction rather than a means by which to strike down acts of Congress. In this regard the Court has stated that:

> In recent years, our application of the non-delegation doctrine principally has been limited to the interpretation of statutory texts, and more particularly, to giving narrow constructions to

> statutory delegations that might otherwise be thought to be unconstitutional.

Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989).

In contravention of the Supreme Court's trend, however, the Eighth Circuit gave a wildly broad construction to § 465 – asserting, for example, that the section allows the Secretary to "purchase the Empire State Building in trust for a tribal chieftain as a wedding present" – and thus found § 465 to be unconstitutional. *South Dakota* 69 F.3d at 882, *App.*, 7a.

B. The Eighth Circuit Failed To Understand That Where Congress Has Performed Its Fundamental Legislative Function Of Determining Policy, Delegation Of The Details To A Coordinate Branch Is Constitutionally Permissible

Where Congress has performed its fundamental legislative function of determining legislative policy, under the necessary and proper clause, delegation of the details to a coordinate branch is constitutionally permissible. *Lichter v. United States*, 334 U.S. 742, 778 (1948); *Yakus v. United States*, 321 U.S. 414, 424 (1944). Otherwise, "the legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation." *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).[7]

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[7] Under this principle, even extremely broad delegations have been upheld by this Court. For example, in *Touby v. United States*, 500 U.S. 160 (1991), Congress delegated authority to the

Here, in accordance with constitutional law, Congress has established the law and policy behind the IRA and § 465. In fact, it would be hard to find a more carefully considered congressional determination of legislative policy than that surrounding the passage of the IRA. The context in which the IRA was passed and the legislative history surrounding that Act clearly demonstrate that Congress specifically enacted § 465 to return land and viability to the Indian people after the failed policy of allotment. *See* Section C, *infra*.

Furthermore, the delegation here is exactly the type envisioned by the necessary and proper clause. U.S. Const. art. I, § 8. In this case, it would have been extremely impractical for Congress to specify each acre of land to be taken into trust under its land acquisition policy. With over 500 federally recognized tribes and possibly millions of acres of land at stake, the burden on

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Attorney General to designate drugs as controlled substances with the only limitation being that they must pose an "imminent hazard" to the public safety. 500 U.S. 160 (1991). Likewise, in *Yakus v. United States*, 321 U.S. 414, 424 (1944), the Court upheld a broad delegation of authority to the price administrator to fix prices where the discretion was guided only by the broad standard that such prices must be "generally fair and equitable."

Congress to specify each parcel would have been oppressive.[8]

C. The Eighth Circuit Failed To Properly Consider The Legislative History

In determining whether a statute constitutes an unconstitutional delegation of legislative power, the statutory standards "derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." *American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946). As demonstrated in *Mistretta*, a statute's legislative history can often be the instrument which provides that "factual background and statutory context." 488 U.S. at 376 n.10 (1989). *See also Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 593 (1985). Instead of using the limitations enunciated in the legislative history, however, the Eighth Circuit here improperly considered only the "four corners of the statutory language" in its analysis. *South Dakota*, 69 F.3d at 885.

Here, the legislative history of the IRA demonstrates that Congress did establish law and policy, enacting § 465 in order to "reverse the effects of the Indians' loss of land under the allotment policy and to help Indians become more sufficient, both economically and otherwise." H.R.

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[8] Unless the Eighth Circuit's decision is reversed, however, tribes will be forced to go to Congress to have land taken into trust. Such a result will needlessly bog down the Congressional process in direct opposition to Congress' intent that it not be forced to make such detailed decisions in order to implement its Indian policy.

Rep. No. 1804, 73rd Cong., 2d Sess. 1 (1934). This Court has itself found that the legislative history clearly demonstrates that the intent of Congress in passing the IRA was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe*, 411 U.S. at 152 (1973) (*quoting*, H.R. Rep. No. 1804, 73rd Cong., 2d Sess. 1 (1934)). *See also, Morton v. Mancari*, 417 U.S. 535, 542 (1974) (finding that the overriding purpose of the IRA was "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.").

D. The Eighth Circuit Likewise Failed To Consider The Regulations Adopted By The Secretary Pursuant To § 465 As Providing Meaningful Standards

The policy and practice of the Secretary in applying the statute provides an important interpretive framework to adjudge whether the statute possesses appropriate boundaries. Courts often look to the regulations drafted by the federal agency charged with implementing the statute when evaluating whether constitutionally required limitations on discretion exist. *See, e.g., Yakus*, 321 U.S. at 426 (the restrictions articulated in the Administrations "statement of consideration" informed Court's decision that statute was not constitutionally infirm). In this present action, the regulations promulgated by the Secretary to govern the acquisition of land under § 465 provide detailed standards governing the exercise of discretion. For example, the regulations delimit what land the Secretary is permitted to take in trust, 25 C.F.R.

§ 151.3(a)-(b), and specify factors for the Secretary to consider in evaluating whether to take a parcel of land into trust. 25 C.F.R. § 151.10. The regulations even provide procedures to flush out possible state and local challenges to trust acquisitions. 25 C.F.R. §§ 151.10, 151.11 (60 Fed. Reg. 32,879, June 23, 1995). Finally, new regulations now clearly provide for an opportunity for judicial review. 61 Fed. Reg. 18,082 (1996).

E. The Eighth Circuit Failed To Properly Consider The Availability Of Judicial Review In Upholding A Statute Against A Non-Delegation Challenge

This Court has indicated that the availability of judicial review is a relevant consideration when reviewing the constitutionality of a statute under the non-delegation doctrine. *See, e.g., Skinner v. Mid-America Pipeline*, 490 U.S. 212 (1989) (*citing, American Power & Light Co., v. SEC*, 329 U.S. 90 (1946)). The Eighth Circuit purported to recognize this principle, stating that "[j]udicial review is a factor weighing in favor of upholding a statute against a non-delegation challenge." *South Dakota*, 69 F.3d at 882, *App.*, 6a.

Despite this explicit acknowledgment, however, the Eighth Circuit failed to analyze whether the Secretary's decision under § 465 was subject to judicial review.[9] This

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[9] Instead, without analysis, the Eighth Circuit merely invoked statements made to the district court by the United States that such review was not available. *See, e.g., South Dakota* 69 F.3d at 880, 884. Such reliance on mere statements is not adequate. First, this Court has admonished courts not to issue

failure is particularly significant now in light of the recently enacted regulations which clarify that there is judicial review of Secretarial decisions under § 465. 61 Fed. Reg. 18,082. *See Jean v. Nelson*, 472 U.S. 846, 854 (1985) (holding by implication that regulations promulgated pending review may influence statutory interpretation on appeal).

rulings based on statements and opinions, particularly where doing so raises constitutional questions. *See, e.g., FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Second, because the issue of judicial review is a legal question, the Eighth Circuit's review was de novo. *See United States v. Bell*, 5 F.3d 64, 68 (4th Cir. 1993). Under this standard, the court should have made a fresh, independent determination of the issue of judicial review.

CONCLUSION

For the reasons stated above, the United States' Petition for a Writ of Certiorari should be granted by this Court.

Dated this 3rd day of July, 1996

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No. 95-1956

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In The

Supreme Court of the United States

October Term, 1995

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Petitioners,

v.

STATE OF SOUTH DAKOTA AND CITY OF OACOMA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICI CURIAE THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY, THE UPPER SIOUX COMMUNITY, THE GRAND PORTAGE BAND OF CHIPPEWA INDIANS, THE RED LAKE BAND OF CHIPPEWA INDIANS, AND THE SISSETON-WAHPETON SIOUX TRIBE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF OF AMICI CURIAE

THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY, THE UPPER SIOUX COMMUNITY, THE GRAND PORTAGE BAND OF CHIPPEWA INDIANS, THE RED LAKE BAND OF CHIPPEWA INDIANS, AND THE SISSETON-WAHPETON SIOUX TRIBE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, the above-listed American Indian Tribes file this brief in support of the United States' Petition for a Writ of Certiorari. Letters of consent from counsel for all parties to the proceeding have been filed with the Clerk.

These *amici* are federally recognized Indian Tribes with significant amounts of land held in trust for them by the United States. Additionally, most of the *amici* have either acquired, or are seeking to acquire, land which they intend the United States to take into trust for them to facilitate economic development. The decision of the United States Court of Appeals for the Eighth Circuit in this case has placed in doubt the status of the Tribes' currently held trust lands. Furthermore, the decision has stalled much needed tribal economic development, as the Secretary of the Interior ("Secretary") has halted all fee-to-trust acquisitions in states within the Eighth Circuit since that court's decision. A more detailed description of each *amicus* appears in the Appendix.

SUMMARY OF ARGUMENT

The Eighth Circuit has improperly annulled an Act of Congress, 25 U.S.C. § 465, under the nondelegation doctrine. *State of South Dakota v. U.S. Dept. of Interior*, 69 F.3d 878 (8th Cir. 1995). A judgment by a Court of Appeals that an Act of Congress is unconstitutional is an exceptional event with inevitably serious implications for the relationship of the federal government's coordinate branches. *See United States v. Gainey*, 380 U.S. 63, 65 (1965). Consequently, the Supreme Court has treated such judgments as worthy of the grant of review.

The Eighth Circuit has resurrected a long-dormant constitutional doctrine and used it to invalidate an important and publicly beneficial statute which has survived judicial review periodically throughout its 60-year existence.[1] The Supreme Court must review the Eighth Circuit's judgment both because it erroneously strikes down an important legislative piece of the trust relationship between the federal government and Indian Tribes, and because the Court should clearly define for the Courts of Appeals the present-day limitations on the nondelegation doctrine.

Nationwide uniformity in the application of a Congressional Act is implicated in this Court's decision whether or not to grant review. Resolving circuit conflicts and promoting uniformity in the application of law has

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[1] *See, e.g., United States v. 29 Acres of Land*, 809 F.2d 544 (8th Cir. 1987); *Chase v. McMasters*, 573 F.2d 1011 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978); *State of Florida Dept. of Bus. Reg. v. U.S. Dept. of Interior*, 768 F.2d 1248 (11th Cir. 1985).

always been an important function of the Supreme Court. *Braxton v. United States*, 500 U.S. 344, 347 (1991). A conflict among the circuits exists here. The United States Court of Appeals for the Eleventh Circuit has held, properly, that the Secretary's decisions to take land into trust under 25 U.S.C. § 465 are not reviewable in federal court. *State of Florida Dept. of Bus. Reg. v. U.S. Dept. of Interior*, 768 F.2d 1248 (11th Cir. 1985) (hereinafter *State of Florida*). This case especially warrants legal clarification because it involves an historically federal area of law – Indian land policy – which has been long considered a province of legislative, not judicial, discretion. *See, e.g., Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465, by its plain statutory language sets forth a bright line rule governing the discretion delegated to the Secretary. The Secretary may acquire land only "for the purpose of providing land for Indians." 25 U.S.C. § 465. Congress also explicitly provided for "where" it desired the Secretary to acquire land for Indians – "within *or* without existing reservations" – though Congress expressly excluded certain lands and Tribes. *Id.* (Emphasis added.) It is impossible for the Secretary to contravene the intent of Congress in exercising his delegated authority without such behavior being obvious. No statutory bounds can physically stop administrative usurpations of power, but for purposes of the constitutional nondelegation doctrine a statute is only improperly drafted when "it is impossible to ascertain whether the will of Congress has been obeyed." *Yakus v. United States*, 321 U.S. 414, 426 (1944). Such is not the case with 25 U.S.C. § 465.

A second statute is relevant to this Court's decision to grant review. Congress intended to provide exceptions to the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 ("APA"), and to reserve to itself the power to define federal subject matter jurisdiction by statute. *See* 5 U.S.C. § 701(a). By holding 25 U.S.C. § 465 unconstitutional on the premise that there is no "law" for judicial review of the Secretary's decisions,[2] the Eighth Circuit erroneously converted the test for determining whether Congress has committed administrative action to agency discretion by law, *Heckler v. Chaney*, 470 U.S. 821 (1985), into a test of whether a statute is unconstitutional as a violation of separation of powers principles. The Court of Appeals' decision has functionally restricted Congress' power to limit judicial review not only by obviating the exceptions to such review contained in 5 U.S.C. § 701(a), but by setting a precedent that legislation which authorizes administrative discretion exempt from review will be highly susceptible to constitutional challenge on separation of powers grounds.

Finally, the Court should grant review to remove the prospect of federal court litigation by local interests throughout the nation adverse to Indian political and economic self-determination. The Indian Reorganization

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[2] The Eighth Circuit held: "[W]hen Congress authorizes the Secretary to acquire land in trust 'for Indians' it has given the agency no 'intelligible principle,' no 'boundaries' by which the public use underlying a particular acquisition may be defined and judicially reviewed." 69 F.3d at 883.

Act has slowly regenerated the nearly decimated territorial and political integrity of American Indian Tribes. The Act is an expression of Congressional intent to exercise the United States' trust relationship with the Indian Tribes to promote Indian self-determination. Its purposes should not be frustrated by state governments and other local interests traditionally insensitive to Indian sovereignty.

Plenary review and reversal by the Supreme Court of the Eighth Circuit's judgment is legally proper and a significantly more efficient use of judicial resources than a remand in light of the recently promulgated Interior Department regulations, 61 Fed. Reg. 18082 (1996), as proposed by the Petitioners as an alternative remedy. A remand would wrongly: (1) open a myriad of new litigation issues (e.g., administrative creation of federal subject matter jurisdiction, sufficiency of regulatory remedies for statutory constitutional infirmity); (2) leave unresolved for an indeterminate period of time a situation where a Congressional statute intended to be applied uniformly throughout the nation remains unconstitutional in only one federal circuit; (3) leave numerous Tribes, including these *amici*, and thousands of Indian people in a state of uncertainty as to the status of their land and their political and economic future; and (4) sanction state and local interference with federal Indian land policy through approval of the Interior Department regulations.

ARGUMENT

I. The Supreme Court Should Review The Judgment Of The Eighth Circuit Because 25 U.S.C. § 465 Is Not An Unconstitutional Delegation Of Legislative Power.

A. The Exceptional Nature And Unprecedented Scope Of The Eighth Circuit's Judgment Warrant Supreme Court Review.

"The grave power of annulling an Act of Congress" is most worthy of Supreme Court review. *Gainey*, 380 U.S. at 65. Here, the Eighth Circuit has held unconstitutional a statute in effect for over 60 years, under a doctrine which this Court has not used to invalidate a statute since the Great Depression.

Congress has long been recognized to have plenary power over Indian affairs, and courts have often acknowledged that there is no federal subject matter jurisdiction over many questions involving federal-state-Indian relations. *See generally, Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Bryan v. Itasca County*, 426 U.S. 373 (1976). States' dissatisfaction with the ramifications of the Indian Reorganization Act should be voiced in Congress, not in the federal courts. That was the purpose behind Congress' decision to insulate the Secretary from judicial review of his or her trust acquisition decisions under 25 U.S.C. § 465. As a result, review by this Court is especially important in that it will serve to reaffirm not only the constitutionality of the particular statute at issue, 25 U.S.C. § 465, but will also reaffirm the preeminence of legislative authority in federal Indian law.

Additionally, there is a conflict among the federal circuits as to the constitutionality of Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465. *See State of Florida*, 768 F.2d at 1256-7 (holding that the Secretary's discretion under the statute was not subject to judicial review, yet was a proper execution of Congressionally delegated discretion). It is patently unfair for Tribes in the Eighth Circuit to have the status of their lands cast into doubt and their sovereignty compromised without the benefit of Supreme Court review. The constitutionality of this widely implemented statute should be uniformly accepted throughout the country. Congress should not be forced to redraft a fee-to-trust acquisition statute because of the decision of one Circuit Court of Appeals.

The Eighth Circuit's decision in this case generates uncertainty about the status of all lands taken into trust for Indians and Tribes since 1934, and could be the undoing of 60 years of recovery of land lost by Indians and Tribes during the allotment era. If this Court does not review the judgment of the Court of Appeals, that judgment will spawn widespread litigation over the retroactive effect of the Eighth Circuit's decision. Further, it will prevent Tribes and individual Indians from expanding their land holdings under the most generally applicable federal law by which lands may be taken into trust for the benefit of Tribes and Indians, and under which Tribes may reclaim or expand their reservations.

B. The Court Should Grant The Petition For A Writ Of Certiorari Because Of The Constitutional Error Of The Appeals Court.

The Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 ("IRA" or "Act"), is an articulation of Congress' desire to implement major changes in federal Indian policy, and to rectify the detrimental assimilationist policies of the late 19th and early 20th centuries. Congress made clear in the legislative history of the IRA that its purposes were "to give the Indians the control of their own affairs" and "to rehabilitate the Indian's economic life." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973), *quoting* Senator Wheeler, the bill's sponsor, and H. R. Rep. No. 1804, 73rd Cong., 2d Sess. 6 (1934). Thus, the Supreme Court construes the IRA's purposes as promoting tribal "self-government," *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *Fisher v. District Court*, 424 U.S. 382 (1976); and "economic development," *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

The Act is broad in scope and sweeping in its effects. An integral component of the Act is the provision in Section 5 for the acquisition of lands to be held in trust for Indians and Indian Tribes. 25 U.S.C. § 465. The restoration and expansion of Indian territorial sovereignty was one of the express goals of Congress in passing the IRA, and Section 5 was Congress' chosen means to that end. Congress delegated to the Secretary the power to execute its mandate that Indian land holdings be restored and expanded. In other words, Congress decided *what* it

wanted done (restoration of Indian political sovereignty and economic self-sufficiency), decided *how* it should be done (trust land acquisition, among other means), and delegated the authority to *get it done* to the Secretary of the Interior. "Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out . . . . " *United States v. McGowan*, 302 U.S. 535, 538 (1938). So long as Congress has expressed the manner by which its goals are to be achieved, the statute is sufficiently drawn to satisfy the nondelegation doctrine. " '[T]he criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose' of the Act." *Mistretta v. United States*, 488 U.S. 361 (1989), *quoting Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940).

Under the nondelegation doctrine, legislation is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta*, 488 U.S. at 372-373, *quoting American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). Here, the Secretary's discretion is sufficiently bounded. The statute leaves no room for the Secretary to assume arbitrary power.

The plain language of the statute delineates the parameters of the Secretary's authority. Purchases and fee-to-trust conversions must be "for the purpose of providing land for Indians;" land cannot be acquired for the Navajo Indians outside of the boundaries of their reservation; and the statute states that the Secretary "in his discretion" may acquire "any interest in lands . . . within or without existing reservations." 25 U.S.C. § 465.

Congress has specifically asserted that the means (land acquisition) for restoring territorial sovereignty and economic self-sufficiency shall be expansive, and shall permit acquisition within and without existing reservations. The Secretary is not making the policy choice to authorize acquisitions outside of existing reservations. Congress has already expressed that legislative intent.

So long as any purchase or fee-to-trust conversion is for the purpose of providing land for Indians, Congress' intent has been followed. The plain language and legislative history of Section 5 of the IRA establish constitutionally sufficient bounds on Secretarial discretion, drawing a clear line limiting acquisitions to those "for the purpose of providing land for Indians." Because the land either is, or is not, acquired for the purpose of providing land for Indians to use in their best interest, Congress can easily ascertain situations in which the Secretary has abused his or her delegated authority. The proper analysis is not whether an administrative agent can theoretically circumvent the intent of Congress (as implied by the Eighth Circuit's opinion), but whether Congress will be able to determine if and when such an agent exceeds his or her authority under the statute and take appropriate legislative action. *Yakus v. United States*, 321 U.S. 414 (1944).

Furthermore, "[w]e begin, of course, with the presumption that the challenged statute is valid. Its wisdom is not the concern of the courts . . . . " *INS v. Chadha*, 462 U.S. 919, 944 (1983). "Interpreting a law enacted by

Congress to implement the legislative mandate is the very essence of 'execution' of the law." *Bowsher v. Synar*, 478 U.S. 714, 733 (1986). "When the Executive acts, it presumptively acts in an executive or administrative capacity as defined in Art. II." *Chadha, supra*, at 951. The action taken by the Secretary in this case was a constitutionally proper executive decision. This Court should review the Eighth Circuit's improper interference with that action.

C. The Eighth Circuit's Speculation That The Secretary's Acquisitions May Not Be For A Public Purpose Is Erroneous.

Congress intended in passing the Indian Reorganization Act of 1934 to put an end to the destructive and paternalistic Indian policies existing at the time. Accordingly, judicial interpretation of 25 U.S.C. § 465 can only be consistent with Congressional intent if it acknowledges that the power of the Secretary is limited to the acquisition of land and the fee-to-trust conversion, and does not generally extend to considerations of how the land is to be used. Land use determinations are best left to the Tribes in their sovereign capacity. *See Santa Clara Pueblo*, 436 U.S. at 55. The opinion of the Eighth Circuit erroneously suggests that the prospective use of the land is an essential factor in the Secretary's decision to acquire land in trust. 69 F.3d at 882-3. Instead of examining whether the Secretary's use of authority under the IRA was valid in terms of the historical setting of that statute's enactment, the Eighth Circuit examined whether the

Secretary's actions would violate the nondelegation doctrine if he "purchase[d] the Empire State Building in trust for a tribal chieftain as a wedding present," 69 F.3d at 882, or "provide[d] a lake home for a politically faithful tribal officer." *Id.* Under the correct constitutional analysis, such wild speculation upon possible misuses of Secretarial discretion under 25 U.S.C. § 465 cannot justify application of the nondelegation doctrine to invalidate the statute. "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases . . . . " *United States v. Raines*, 362 U.S. 17, 22 (1960).

The "public use" of trust acquisitions under the IRA – which the Eighth Circuit repeatedly asserted was necessary to demonstrate constitutionality – is simply to provide lands for Indians. The protection of Indian tribal sovereignty has been deemed by Congress, and by the courts, as both a public interest and a "national duty." *Nevada v. United States*, 463 U.S. 110, 142 (1983). Land acquisitions under Section 5 of the IRA are necessarily for a "public use" for the very reason that they are for Indians. The particular use for any given parcel of Indian land is, to be consistent with the IRA's policy supporting Indian self-determination, generally for the Tribe, not the Secretary, to determine.

D. The States Should Not Individually Have Influence Over Federal Indian Policy Decisions.

As stated, Congress intended in the IRA to promote tribal sovereignty and economic development. Essential to these goals was the restoration of the Indian Tribes'

drastically depleted land base. Accordingly, the means which Congress employed to accomplish the goals of tribal sovereignty and development was to authorize the Secretary, in his discretion, to acquire lands in trust for Indians and Indian Tribes. In order to be consistent with the statutory goals of tribal sovereignty and development, the decision of the Secretary to put lands in trust must be discretionary and free from state and local interference.

The State of South Dakota in this case, as well as the other states, is not an innocent third party suffering the externalities of a harmful federal policy. "They [the Tribes] owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886). Unfortunately, anti-Indian sentiments remain with us today.

It is very difficult to detect any way in which the states are injured when Indian Tribes' trust lands are enlarged by acquisitions under 25 U.S.C. § 465. The Eighth Circuit stated that the removal of the land from state tax rolls, as well as the inapplicability of state zoning laws on Indian land, exemplified the detrimental effect that fee-to-trust acquisitions have on the states. 69 F.3d at 882-3. However, members of Indian Tribes rely on the federal government for most entitlements and benefits, and therefore the taxes collected by the states on Indian-owned land are essentially a windfall to those states. Furthermore, the applicability of state law (e.g. zoning) in Indian country is contrary to the IRA's objectives of tribal sovereignty and economic development.

Whether the state's influence occurs after the land is acquired in trust, or during the Secretary's decision to acquire land in trust, is irrelevant. States do not belong in the decision-making process when Indian lands are in question. That process is a function of the trust and the government-to-government relationships amomg Indians, Indian Tribes, and the United States.

II. The Supreme Court Should Review The Judgment Of The Eighth Circuit Because Of Its Disregard Of Congressional Intent Expressed In 5 U.S.C. § 701(a).

The Eighth Circuit failed to apply properly two distinct legal doctrines. First, it misapplied the nondelegation doctrine and ignored the intelligible principles governing the delegation of power to the Secretary that exist in the plain language of 25 U.S.C. § 465. In so doing, the Court of Appeals suggested that any statute which delegates administrative authority and commits such authority to "agency discretion by law," *Heckler v. Chaney*, 470 U.S. 821 (1985), carries with it the seeds of constitutional defect. The Eighth Circuit inappropriately intermingled the statutory test for determining whether action is committed to agency discretion by law with the test for determining whether a statute violates the constitutional nondelegation doctrine.

The fact that the "intelligible principles" in 25 U.S.C. § 465 make it "possible to ascertain whether the will of Congress has been obeyed," *Yakus*, 321 U.S. at 426, does not subject the Secretary's decisions under that statute to judicial review. The Eleventh Circuit in *State of Florida*, 768 F.2d 1248, recognized this fact, and the Eighth Circuit

in this case acknowledged the Secretary's then-opinion that this was "agency action committed to discretion by law," not subject to judicial review. 69 F.3d at 880.

25 U.S.C. § 465 places the trust decision explicitly in the Secretary's "discretion." Whether one treats the delegating language as an express bar to judicial review or as a commitment of action to agency discretion by law, the Administrative Procedure Act, by its terms in 5 U.S.C. § 701(a), encompasses no cause of action to review the Secretary's exercise of discretion. The Eleventh Circuit further noted that the relevant Interior Department regulations, 25 CFR Part 151, are "guides for the exercise of the Secretary's discretion" but not " 'law' that a reviewing court can apply" for the purposes of judicial review. *State of Florida*, 768 F.2d at 1256.

The Eighth Circuit in its opinion implied, however, that the Secretary's construction of the statute – that there was no "law" to apply and therefore it committed action to agency discretion – was contrary to Congressional intent. 69 F.3d at 883. The court improperly applied the Secretary's construction of the reviewability of his discretion under the statute to its nondelegation analysis. *Id.* at 884. The Secretary's interpretation of his delegated authority and of the unavailability of judicial review was consistent with Congressional intent. The action he undertook that instigated this litigation – acquiring land in trust for the Lower Brule Sioux Tribe – was well within the bounds of his discretion as expressed in the statute. Likewise, his assertion to the district court that his decision was not subject to judicial review was perfectly in accordance with Congressional intent as well, as expressed in the plain language of 25 U.S.C. § 465. The

Eleventh Circuit – and earlier, the Secretary – properly viewed the regulations in 25 CFR Part 151 as guidelines to aid the Secretary in establishing uniformity among his decisions under the statute, and not as judicially enforceable rules:

> The regulation does not purport to state how the agency should balance these factors in a particular case, or what weight to assign to each factor . . . . The factors listed in the regulation are not the kind of legal principles courts are familiar with applying to a particular case.

State of Florida, 768 F.2d at 1256-7.

The language chosen by Congress in 25 U.S.C. § 465 and 5 U.S.C. § 701(a) precludes judicial review of the Secretary's decision to take land into trust for Indians. There is no federal subject matter jurisdiction over the Respondents' claims. Nonetheless, the Eighth Circuit largely based its decision that 25 U.S.C. § 465 was unconstitutional on the fact that the Secretary asserted that there could be no judicial review of his decision to take land into trust for Indians. In so doing the court failed to adhere to a recent decision of this Court which held that the provision of judicial review is not a necessary condition for a statute to be constitutional. *Touby v. United States*, 500 U.S. 160, 168 (1991). The appellate court believed that any delegation of authority unaccompanied by judicial review required a "close look," and proceeded to use the Secretary's proper assertion that judicial review was precluded as grounds for striking down the statute under the nondelegation doctrine.

Premising a finding of unconstitutionality on a lack of judicial review frustrates the purposes of 5 U.S.C.

§ 701(a) and calls into doubt whether Congress can ever employ the exceptions provided in that section of the Administrative Procedure Act. The express purpose of that section's exceptions to the succeeding statutory language was to allow Congress to retain the power to limit judicial review in certain relatively rare circumstances, such as the exercise of the United States' trust responsibility in acquiring land for Indians. The Eighth Circuit's judgment has frustrated the intent of the APA as well as the intent of the IRA. As long as Congress meets the minimum threshold of expressly clarifying the purpose and limits of the power delegated to an agency, then the presence or absence of judicial review should not be used to defeat an otherwise constitutional statute.

III. The Supreme Court Should Grant Plenary Review Of The Eighth Circuit's Judgment.

This Court should grant the petition for writ of certiorari, vacate the judgment of the Eighth Circuit, and affirm the judgment of the district court on the grounds that there is no federal subject matter jurisdiction over Respondents' claims. To remand this case to the district court or the Secretary, as the Petitioners suggest in the alternative, would not resolve the constitutional questions involved. The question squarely raised by this case is whether the statute itself violates the nondelegation doctrine, not whether the Interior Department regulations render it constitutional. A regulatory fix cannot, *post hoc*, remedy what the Eighth Circuit perceived as a constitutional flaw. The new regulations, 61 Fed. Reg. 18082 (1996), contravene Congress' intent to commit acquisition

decisions to the Secretary's discretion, and they purport to create federal subject matter jurisdiction without the requisite Congressional mandate. A remand to allow more litigation under the new regulations would compound, not cure, the Eighth Circuit's error.

A remand would also be an inefficient use of judicial and administrative resources. No purpose is served by additional litigation over a constitutional statute which by its terms and those of the Administrative Procedure Act precludes judicial review of the Secretary's fee-to-trust decisions.

CONCLUSION

For the foregoing reasons, the Supreme Court should grant plenary review of the appellate court's decision and decline to remand the case in light of the recently promulgated regulations of the Interior Department. The Supreme Court should then vacate the Eighth Circuit's judgment and affirm the judgment of the district court on the grounds that the Secretary's discretionary decision to

take land into trust for Indians under 25 U.S.C. § 465 is not subject to judicial review.

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APPENDIX

The Shakopee Mdewakanton Sioux (Dakota) Community

The Shakopee Mdewakanton Sioux (Dakota) Community is a federally recognized Indian Tribe located near the Twin Cities in Minnesota. It was organized pursuant to the Indian Reorganization Act through a Constitution approved by the Secretary of the Interior.

Originally, the Shakopee Community consisted of only a few hundred acres. Since its organization in 1969, however, the Shakopee Community has more than doubled its original land holdings by purchasing land and having it put into trust by the United States. The Shakopee Community currently has a request for trust acquisition for five hundred acres pending with the Bureau of Indian Affairs, which has been put on hold because of the Eighth Circuit's decision in this case. The appeals court's decision has directly affected the Shakopee Community and its ability to expand its land holdings.

The Upper Sioux Community

The Upper Sioux Community is a federally recognized Indian Tribe located near Granite Falls, Minnesota. On or about October 6, 1938, pursuant to 25 U.S.C. § 465, the United States government placed in trust for the use and benefit of the Upper Sioux Community approximately 740 acres in Yellow Medicine County in the State of Minnesota, of which only 80 acres were above the flood plain of the Minnesota River.

The Upper Sioux Community has only recently achieved the means to acquire additional land in order to

satisfy its members' demands for residential housing. The Eighth Circuit's decision has seriously disrupted the Upper Sioux Community's plan to place in trust acquired land above the Minnesota River flood plain.

Grand Portage Band of Chippewa

The Grand Portage Band of Chippewa is a federally recognized Indian Tribe and a member of the Minnesota Chippewa Tribe. The Band's reservation land base was originally defined by the Treaty of 1854, but since that time the Band has procured various other tracts of land, including islands in Lake Superior, pursuant to the IRA and the Executive Order of March 21, 1871. Presently, approximately 85% of all land within the boundaries of the Grand Portage Reservation is held in trust by the United States for the benefit of the Tribe, the Band or individual Indians. The Eighth Circuit's decision in this case could adversely impact the status of the Band's land holdings.

Red Lake Band of Chippewa Indians

The Red Lake Band of Chippewa Indians is a federally recognized Indian Tribe located in north central Minnesota, with a tribal population of over 8,000 members. The Red Lake Band is not organized under the IRA; however, the fee-to-trust provisions found in 25 U.S.C. § 465 have been used by the Band to place land into trust on numerous occasions. Over 99% of the land within the exterior boundaries of the Band's reservation is held in trust in common by members of the Band. The Eighth

Circuit's decision in this case has far-reaching ramifications on the Band's past and future efforts at putting land into trust. The immediate result of the appellate court's ruling is that pending fee-to-trust transactions are being held up and several of the Band's land initiatives are in suspension.

The Sisseton-Wahpeton Sioux Tribe

The Sisseton-Wahpeton Sioux Tribe is a federally recognized Indian Tribe located in northeastern South Dakota, with a tribal population of over 10,000 members. The Tribe is situated on the Lake Traverse Reservation, as established by the Treaty of February 19, 1867.

Although the Sisseton-Wahpeton Sioux Tribe declined reorganization under the IRA pursuant to 25 U.S.C. § 478, the provisions of 25 U.S.C. § 465 are nonetheless made applicable to the Tribe through the 1983 enactment of the Indian Land Consolidation Act, 25 U.S.C. § 2201 *et seq.* Because the Sisseton-Wahpeton Sioux Tribe has, over the past several years, reacquired and placed into trust status acreage located within the original boundaries of the Lake Traverse Reservation, the status of this trust acreage is left in doubt based upon the Eighth Circuit's decision in this case.

(12)

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

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Petitioners,
v.
STATE OF SOUTH DAKOTA and CITY OF OACOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE SAN MANUEL BAND OF MISSION INDIANS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. INTRODUCTION

The amicus curiae San Manuel Band of Mission Indians (hereinafter "San Manuel Band") files this brief in support of the United States Department of the Interior's Petition for a writ of certiorari, upon the written consent of all parties.

The court of appeal's decision, striking down a key provision of the Indian Reorganization Act, 25 U.S.C. section 465, on constitutional grounds, has potentially drastic implications for Indian Tribes across the nation. For the past 60 years, the Secretary of Interior's authority to take lands into trust for Indians under 25 U.S.C. section 465 has been fundamental to Tribes' very survival in this country. The court of appeal's decision would, if let stand, turn the clock back to an earlier time in this nation's history when federal policy sought extinction of Indian Tribes.

This brief first explains the interests of the amicus curiae San Manuel Band. It next raises four arguments, each of which independently warrant granting a writ of certiorari. First, the court of appeal unnecessarily decided a constitutional question. In so doing, the court adopted a statutory interpretation that created, rather than avoided, constitutional difficulties, and declined to adhere to this Court's well-established tenets of statutory interpretation in the field of federal Indian law. Second, ignoring this Court's precedents, the court of appeal failed to require that the Secretary prove that his decision to take land into trust for the Lower Brule Tribe is unreviewable under the Administrative Procedure Act, 5 U.S.C. sections 701-706 (hereinafter "APA"). Third, the court of appeal ignored the threshold question of whether federal power over Indian affairs is exclusively legislative, or is shared both by the President and Congress. Finally, the court of appeal erroneously held that section 465 is an unconstitutional delegation of legislative authority. Contrary to the court of appeal's view, the statute embodies Congress' choice of social policy, provides the Secretary of the Interior with an intelligible principle to guide his trust acquisition decisions, and provides ascertainable standards against which the Secretary's delegated discretion may be tested.

For these reasons, the San Manuel Band respectfully requests that this Court grant the United States Department of the Interior's petition for a writ of certiorari.

II. INTERESTS OF AMICUS CURIAE

The San Manuel Band is a federally-recognized Indian Tribe, located in southern California. *See* 58 Fed. Reg. 54364, 54368. The Band originally occupied, derived its economic support from, and dwelled upon hundreds of square miles of land, which included streams and fertile acreage. In the late 1800s, however, the federal government relocated the Band to a square mile reservation consisting principally of steep, dry mountainous terrain. It was only through the trust process that the Band was able to acquire a few acres of flat land just after the turn of the century. Pursuant to section 465 of the IRA, the Secretary of the Interior recently has taken additional land into trust for the Band's benefit on which the Band is constructing housing for its members. The Band also has several requests pending before the Secretary under section 465 to take additional lands into trust so that it can construct more tribal housing, a health care clinic, meeting and governmental office facilities, and a day care center. There is no other land on the reservation which would be suitable to meet those needs.

The Band thus has a substantial interest in defending the Secretary's authority to take lands into trust pursuant to the IRA.

III. ARGUMENT

A. The Court of Appeal Unnecessarily Decided a Constitutional Question

The court of appeal should have first decided the question of whether APA review was available. Such an analysis might well obviate the need to address the constitutional question of delegation of legislative authority. *See Zobrest v. Catalina Foothills School Dist.*, __ U.S. __, 113 S.Ct. 2462, 2471 (1993) ("obligation to avoid unnecessary adjudication of constitutional questions").[1]

A second, closely related, problem with the court of appeal's opinion is that it violates the time-honored rule that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent

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[1]This obligation is a "'self-imposed limitation on the exercise of this Court's jurisdiction [that] has an importance to the institution that transcends the significance of particular controversies.'" *Zobrest*, 113 S.Ct. at 2471 (*quoting City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294 (1982)).

of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).

Here, as the discussion below at section III(D) of this brief makes clear, the Secretary's decision to take lands into trust is plainly consistent with, not contrary to, Congress' "intent and purpose" in enacting the IRA, which was, *inter alia*, "'to rehabilitate the Indian's economic life ....'" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (*quoting* H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934)).

Related to this general rule of construction is the canon of federal Indian law, ignored by the court of appeal, which requires that "[a]mbiguities in federal law [be] construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980).

By ignoring these rules of construction and unnecessarily deciding a constitutional question while leaving statutory questions unexamined, the court of appeal "has so departed from the accepted and usual course of judicial proceeding ... as to call for an exercise of this Court's supervisory powers." S.Ct. R. 10(a).

B. The Court of Appeal Failed to Require the Secretary to Prove That His Decision Is Unreviewable Under the APA

Federal agency actions are presumptively subject to judicial review, and this presumption may only be overcome by specific statutory language or legislative history that reliably indicates congressional intent to preclude judicial review. *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984). The APA's "generous review provisions must be given a hospitable interpretation." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). Indeed, government agency defendants bear the burden of proving -- not merely asserting -- unreviewability by clear and convincing evidence. *See Barlow v. Collins*, 397 U.S. 159, 167 (1970); *Abbott Laboratories*, 387 U.S. at 141.

The court of appeal nevertheless erroneously found conclusive the Secretary's assertion that his decision to take lands into trust is unreviewable. *See South Dakota v. United States*, 69 F.3d at 880, 881-82, 886. Thus the court "decided an important federal question in a

way that conflicts with relevant decisions of this Court." S.Ct.R. 10(c).[2]

C. The Court of Appeal Ignored The Threshold Question of Whether Federal Power Over Indian Affairs Is Exclusively Legislative or Is Shared by The President And Congress

The court of appeal ignored the threshold question of whether the power to take land into trust for the benefit of Indian Tribes belongs exclusively to Congress. The court assumed, without discussing or deciding, that this power is exclusively legislative in nature. As the following discussion demonstrates, that unexamined assumption is incorrect.

The Court has recognized that certain powers are shared by both the legislative and executive branches of the federal government. *See United Stats ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). In *United States ex rel. Knauff*, an alien war bride, who was excluded from the United States by the Attorney General, challenged the Act of 1941, 22 U.S.C. section 223, as, *inter alia*, an unconstitutional delegation of legislative authority. Rejecting this claim, the Court held that the exclusion of aliens was a fundamental act of sovereignty, and that "[t]he right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." 338 U.S. at 542. Thus "[w]hen Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power." *Id.*

While the Constitution grants Congress power over commerce with Indian Tribes, *see* U.S. Const., art. I, sec. 8, cl. 2, it also grants the executive branch the power to enter into treaties with Tribes. *See* U.S. Const., art. II, sec. 2. Thus the Court has recognized that federal power over Indian affairs is found both in the executive and legislative

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[2]Indeed, had the court of appeal required the Secretary to prove unreviewability, as *Barlow* and *Abbott Laboratories* teach, the Secretary might well have reassessed his position on the question, as in fact he since has. *See* Land Acquisitions (Nongaming), 61 Fed. Reg. 18,082 (1996) (to be codified at 25 C.F.R. 151.12), *reprinted at* Petitioners' Appendix, 64a-69a. The Secretary's new regulations highlight the significance of the court of appeal's deviation from precedent.

branches: "'Indian law' draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments ... form the backdrop for the intricate web of judicially made Indian law ...." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).

In *United States v. John*, 437 U.S. 634, 652-53 (1978), the Court referred to the dualistic nature of the federal power over Indian affairs:

> we do not agree that ***Congress and the Executive Branch*** have less power to deal with the affairs of the Mississippi Choctaws than with the affairs of other Indian groups. Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the ***federal power*** to deal with them.

Id. (emphasis added).

The Court has recognized the executive branch's significant power to deal with Indian affairs. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 180 (1982) ("Repeated decisions of the courts, numerous opinions of the Attorneys General, and the practice of years place beyond debate ... that the executive department of the government of the United States had plenary power to enforce [a Creek Nation permit tax] ... through the Secretary of the Interior and his subordinates, the Indian inspector, Indian agent, and Indian police"). And the Court has recognized that the federal government's "course of dealing" with Indians, including broken promises and treaties negotiated by the Executive branch, gives rise to a "duty of protection, and with it the power" to deal with Indian affairs. *United States v. Kagama*, 118 U.S. 375, 384 (1886).

The Court has repeatedly recognized that many Indian reservations were created, not by Congress or treaty, but by Executive Order.[3] And in *Sioux Tribe v. United States*, 316 U.S. 317 (1942), the

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[3] *See, e.g., United States v. Dion*, 476 U.S. 734, 745 n. 8 (1986) ("Indian reservations created by statute, agreement, or executive order normally carry with them the same implicit hunting rights as those created by treaty"); *Fisher v. District Court*, 424 U.S. 382, 386 n. 9 (1976) ("The Northern Cheyenne Indian Reservation was created by Executive Order"); *Antoine v. Washington*, 420 U.S. 194, 216 (1975) ("The original Coleville Reservation was created by Executive Order"); *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 (1949) ("An Indian reservation created by Executive Order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President"); *Spalding v. Chandler*, 160 U.S. 394, 403 (1896) ("When Indian reservations were created, either by treaty or executive order, the Indians held that land by the same character of title..."); *Ex parte Wilson*, 140 U.S. 575, 576 (1891) ("the White Mountain Indian Reservation ... was created in the first instance by order of the president").

Court noted that it had earlier "squarely held that even in the absence of express statutory authorization, it lay within the power of the President to withdraw lands from the public domain." *Id.* at 325. The Court also recognized that "[b]y 1855 the President had begun to withdraw public lands from sale by executive order for the specific purpose of establishing Indian reservations." *Id.*

Congress too has often recognized that Indian reservations have been lawfully created by executive order. *See, e.g.*, 25 U.S.C. secs. 63, 331, 398a, 398b, 398c, 398d, 398e, 461, 1773.[4] *See also* 25 U.S.C. sec. 71 (acknowledging tribal fishing rights created by executive order).

Congress' acquiescence in the executive branch's creation of Indian reservations further supports the San Manuel Band's view that the executive possesses authority to act in this area. *See Dames & Moore v. Regan*, 453 U.S. 654 (1981) (congressional acquiescence affirmed the President's power to take certain actions attempting to obtain the release of American hostages from Iran). In *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), the Court found that Congress had acquiesced in the President's practice of withdrawing public land that otherwise would have been open to private acquisition when doing so was in the public interest. The fact that Congress knew of and acquiesced in these actions raised "a presumption that the withdrawals had been made in pursuance of its consent or of a

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[4] *See also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 163 n. 5 (1982); *United States v. Payne*, 264 U.S. 446, 447 (1924); *Fairbanks v. United States*, 223 U.S. 215, 217 (1912); *In re Heff*, 197 U.S. 488, 490 (1905).

recognized administrative power of the Executive in the management of the public lands." *Midwest Oil Co.*, 236 U.S. at 474. Even the dissenters acknowledged that:

> The authority which may arise by implication, we think, must be limited to those purposes which Congress has itself recognized by either direct legislation or long-continued acquiescence as public purposes for which such withdrawals could be made by the Executive. That the President might, by virtue of this executive authority, take action to preserve public property, or, in aid of the execution of the laws, ***reserve tracts of land for definitely fixed public purposes, declared by Congress, such as military or Indian reservations, may be conceded*** ....

Id. at 505 (Day, J., dissenting) (emphasis added). And the dissent also recognized that the President's duty to "take care that the laws be faithfully executed," U.S. Const., art. 2, sec. 3, "is not limited to the enforcement of acts of Congress according to their express terms. It includes 'the rights and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution.'" *Midwest Oil Co.*, 236 U.S. at 505 (Day, J., dissenting) (*quoting* Cooley, *Constitutional Law*, 121; *Cunningham v. Neagle*, 135 U.S. 1 (1890)).[5]

The President's broad authority with respect to relations with other sovereign entities arises out of the Article II, section 2, powers relating to the President's treaty-making power, the right to appoint

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[5]Congressional acquiescence in the creation of Indian reservations in New Mexico and Arizona apparently ended with the enactment of 25 U.S.C. section 211, which provides that "No Indian reservation shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of New Mexico and Arizona, except by Congress." The constitutionality of section 211 has apparently never been challenged. In *Healing v. Jones*, 210 F. Supp. 125 (D.C. Ariz. 1962), the court held that this statute did not terminate the Secretary's authority, premised on an 1882 executive order, to settle additional individual Indians and Indian Tribes on a reservation established under that executive order. This Court affirmed the district court's decision in a per curiam opinion. *Healing*, 373 U.S. 758 (1963).

ambassadors, and the role as Commander-In-Chief. These powers, combined with the need to present a clear and unified national policy to other sovereign entities, gives the President a special role in implementing the nation's policies in relation to other sovereigns. The Court emphasized this special role in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

In *Curtiss-Wright*, Congress authorized the President to ban the sale of arms to countries engaged in a particular conflict, and President Roosevelt proclaimed such an embargo. Curtiss-Wright was charged with conspiring to sell arms to Bolivia, one of the countries to which the embargo extended. Curtiss-Wright challenged the joint resolution as being an unconstitutional delegation of legislative power. The Court upheld Congress' resolution and the embargo, emphasizing the President's role in dealing with other sovereign entities. *See id.* at 319-29.

The executive branch's special relationship with Indians and their lands dates to the earliest days of the union. In *Worcester v. Georgia*, 31 U.S. [6 Pet.] 515 (1832), the Court noted that "[t]o give effect to various treaties with [Indians], the power of the executive has frequently been exercised; and at one time General Washington expressed a firm determination to resort to military force to remove intruders from the Indian territories." *Id.* at 576. For more than 150 years, this Court has recognized that the United States possesses a connection so special with Indian tribes that it rises to the level of a trust relationship. *See, e.g.*, *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). This special relationship is evident in the statute at issue in this case:

> The provisions in the Indian Reorganization Act providing that the United States may take land in trust for Indian tribes is one manifestation of this special relationship since it allows the government to secure areas in which the Indian nations may operate as the semi-autonomous peoples the law recognizes them to be.

City of Sault Ste. Marie v. Andrus, 458 F. Supp. 465, 472-73 (D.C.D.C. 1978).

The executive branch's special role in dealing with other sovereigns, as illustrated by *Curtiss-Wright*, and the government's trust relationship with Indian Tribes, support the San Manuel Band's view

that the power to take lands into trust for Indian Tribes is not an exclusively legislative power.

If the power at issue is not solely a legislative power, there can be no unconstitutional delegation. *See United States ex rel Knauff*, 388 U.S. at 542. Thus the court of appeal "has decided an important federal question in a way that conflicts with relevant decisions of this Court." S.Ct. R. 10(c).

D. Section 465 of the IRA Is Not an Unconstitutional Delegation of Legislative Authority

As the above discussion makes clear, the Court need not reach the delegation issue in order to grant the United States' petition for a writ of certiorari. However, should the Court chose to examine that issue, it will find that the court of appeal erred, for the IRA does not unconstitutionally delegate legislative authority to the Secretary.

Congressional delegations of authority are constitutional "'if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (*quoting American Power & Light Co. v. S.E.C.*, 329 U.S. 90, 105 (1946)).

The first of these criteria – a clear policy -- undoubtedly exists in the IRA, which Congress enacted, in part, to "'conserve and develop Indian lands and resources ....'" *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 101 (1949). In other words, as noted above, Congress' "intent and purpose" in enacting the IRA, "was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (*quoting* H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934)). The IRA also clearly makes the Secretary responsible for its implementation, *see* 25 U.S.C. section 465, thus satisfying the second criteria outlined in *Mistretta*.

Contrary to the court of appeal's opinion, the IRA also satisfies the third criteria by delineating the boundaries of the Secretary's authority to take lands into trust. All that is required to satisfy this criteria is that the limits of the delegated authority be clear enough so that ***courts can determine whether the executive branch's actions are consistent with Congress' will***. *See Yakus v. United States*, 321 U.S. 414 (1944).

In *Yakus*, the Court held that the Emergency Price Control Act

of January 30, 1942,[6] did not involve an unconstitutional delegation of legislative power. The Court examined the sufficiency of the statutory "standards which are to guide the Administrator's exercise of his authority ...." *Yakus*, 321 U.S. at 420. The Court explained that:

> ***the only concern of courts is to ascertain whether the will of Congress has been obeyed***. This depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find but upon the determination whether the definition sufficiently marks the field within which the Administrator is to act so that ***it may be known whether he has kept within it in compliance with the legislative will***.... Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers.... Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that ***it would be impossible*** in a proper proceeding ***to ascertain whether the will of Congress has been obeyed***, would we be justified in overriding its choice of means for effecting its declared purpose ....

Id. at 425-26 (emphasis added). *See also OPP Cotton Mills, Inc. v. Administrator of Wage and Hour Division of Department of Labor*, 312 U.S. 126, 144 (1941);[7] *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U.S. 146, 165-66 (1941) (National Labor

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[6]The Emergency Price Control Act, 56 Stat. 23, was codified at 50 U.S.C. App. Supp. II, sec. 901, *et seq*.

[7]*Opp Cotton Mills, Inc.*, held that the Fair Labor Standards Act, 29 U.S.C. secs. 201 *et seq.*, is not an unconstitutional delegation of legislative power. The Court noted that where "the standards set up for the guidance of the administrative agency, the procedure which it is directed to follow and the record of its action which is required by the statute to be kept or which is in fact preserved, are such that Congress, the courts and the public ***can ascertain whether the agency has conformed to the standards which Congress had prescribed, there is no failure of performance of the legislative function***." *Opp Cotton Mills, Inc.*, 312 U.S. at 144 (emphasis added).

Relations Act, 29 U.S.C. secs. 151, *et seq.*, is not an unconstitutional delegation of legislative authority).

In this case the Secretary took "commercial land in trust for the Lower Brule Tribe of Sioux Indians" so that the Tribe could "create an industrial park ...." *South Dakota v. United States Department of Labor*, 69 F.3d 878, 880 (8th Cir. 995). This acquisition is plainly "in compliance with the legislative will," *Yakus*, 321 U.S. at 420, given that Congress' purpose in the IRA was to "develop Indian land and resources," *Hynes*, 337 U.S. at 101, and "rehabilitate the Indian's economic life . . ." *Mescalero Apache Tribe*, 411 U.S. at 152.

The IRA is not a statute in which "Congress has attempted to abdicate, or to transfer to others, the essential legislative functions with which it is vested by the Constitution." *Currin v. Wallace*, 306 U.S. 1, 15 (1939) (upholding Tobacco Inspection Act, 7 U.S.C. secs. 511 *et seq.* against a claim of unconstitutional delegation of legislative authority). The Court has:

> always recognized that legislation must often be adapted to conditions involving details with which it is impracticable for the legislature to deal directly. We have said that --'the Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility.' *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). In such cases 'a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details.' *Wayman v. Southard*, [23 U.S.]10 Wheat. 1, 43 (1825).

Currin, 306 U.S. at 15.

In *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), the Court upheld the Communications Act of 1934, 47 U.S.C. secs. 151, *et seq.*, against a claim of unconstitutional delegation of

legislative authority. In that statute, Congress recognized that radio was a limited medium, such that not everyone who wanted to have a radio station could do so. Thus some method for choosing among interested persons needed to be devised, "[a]nd since Congress itself could not do this, it committed the task to the Commission." *National Broadcasting Co.*, 319 U.S. at 216.

The Court held that Congress provided adequate guidance by requiring that radio licenses be granted based on "'public interest, convenience, or necessary,' a criterion which 'is as concrete as the complicated factors for judgment in such a field of delegated authority permit.'" *Id.* (*quoting Federal Communications Comm. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940)). Certainly if the "public interest" is sufficient guidance for the granting of radio licenses, then so too is the "conserv[ation] and develop[ment] Indian lands and resources," *Hynes*, 337 U.S. at 101, and the "rehabilitat[ion of] the Indian's economic life," *Mescalero Apache Tribe*, 411 U.S. at 152, sufficient to guide the acquisition of Indian trust land.[8]

The court of appeal failed to recognize that so long as courts can "ascertain whether the will of congress has been obeyed," Yakus, 321 U.S. at 426, Congress has adequately set "the boundaries of ...

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[8]The only other case of which the San Manuel Band is aware that addresses the delegation issue in the context of section 465 of the IRA is *City of Sault Ste. Marie v. Andrus*, 458 F. Supp. 465 (D.C.D.C. 1978). In that case, the district court for the District of Columbia had little trouble dispensing of a claim that the statute at issue here was an unconstitutional delegation of legislative power:

> The delegation claim fails because, even though the acquisition of lands in trust is discretionary with the Secretary, see 25 U.S.C. sec. 465, the legislative history and the Act itself, providing as it does a definition of an Indian tribe, do provide adequate standards for the exercise of this discretion. This is not to intimate any opinion as to whether those standards have been met in this case. Rather, it is simply to demonstrate that the delegation theory lacks merit.

City of Sault Ste. Marie, 458 F. Supp. at 473.

delegated authority," *Mistretta*, 488 U.S. at 373. Thus the court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." S.Ct. R. 10(c).

1. The Court of Appeal Ignored the IRA's Context and Factual Background, Which Provide Adequate Standards Against Which Administrative Trust Acquisitions May Be Judged

Statutory standards "need not be tested in isolation. They derive much meaningful content from the purpose of the Act, its factual background, and the statutory context in which they appear." *American Power & Light Co. v. S.E.C.*, 329 U.S. 90, 104 (1946). A statutory criterion is "'not to be interpreted as setting up a standard so indefinite as to confer an unlimited power." *National Broadcasting Co.*, 319 U.S. at 216. Rather, a standard "is to be interpreted by its context ....'" *Id.* (citations omitted). *See also Carlson v. Landon*, 342 U.S. 524, 542 (1952) ("the entire Act is to be looked at and the meaning of the words determined by their surroundings and connections").

The IRA marked a fundamental change in federal Indian policy, in reaction to the allotment policy embodied in the General Allotment Act of 1887, 25 U.S.C. sections 331 *et seq.* The allotment policy presumed that the "destruction of the tribal system was inevitable," and that "termination of tribal life was necessary if the Indian was to participate fully in the American system." F. Cohen, *Handbook of Federal Indian Law*, 131 (1982 ed.) (hereinafter *Cohen*). Allotments of land to individual Indians "were used as a method of terminating tribal existence." *Id.* at 130.

The strategy nearly worked. "The majority of Indian lands passed from native ownership under the allotment policy." *Id.* at 138. In 1887, the year the General Allotment Act was passed, Indian lands totaled approximately 138 million acres. That figure dwindled to 48 million by 1934, the year the IRA was enacted. *Id.* The General Allotment Act was, from the tribal point of view, "the most disastrous piece of Indian legislation in United States history ...." W. Canby, *American Indian Law*, 19 (West 1988).

The IRA "repudiated the allotment policy." *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 436 (1989). The IRA was part of an effort intended "to encourage economic development, self-determination, cultural plurality, and the revival of tribalism." *Cohen*, at 147.

Viewed in this context, *American Power & Light Co.*, 329 U.S. at 104, the court of appeal's opinion that the IRA has an "agrarian focus," is overly narrow. South Dakota v. United States, 69 F.3d at 883. The IRA was by no means limited solely to aiding Indians in agrarian pursuits:

> The IRA was also an attempt to improve the economic situation of Indians. The Act was intended to stop the alienation of tribal land needed to support Indians, and to provide for acquisition of additional acreage for tribes. **Tribes were encouraged to organize along the lines of modern business corporations**; a system of financial credit was included to reach this economic objective. **Educational and technical training opportunities were provided, in addition to positions of responsibility for Indians in the federal Indian service**.

Cohen, at 147 (*citing To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645 Before the Senate Comm. On Indian Affairs*, 73d Cong., 2d Sess. (1934)) (emphasis added).

In sum, by failing to give due weight to the IRA's purpose and context, the court of appeal "has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power." S.Ct.R. 10(a).

2. The Secretary Has Interpreted His Authority Under The IRA in a Reasonable And Limited Way

The court of appeal recognized that "[n]ormally delegation questions are considered in light of a statute's legislative history and context, and any narrowing agency interpretation ...." *South Dakota v. United States*, 69 F.3d at 884 (citations omitted). The court of appeal ignored this convention, however, because it erroneously believed that "the agency has interpreted the statute as broadly as possible ...." *Id.* A brief review of the applicable regulations reveals that, to the contrary, the Secretary has interpreted the authority delegated by the IRA in a reasonable and limited way.

The Secretary's new regulation limits his authority to take lands into trust for Tribes. *See* 61 Fed. Reg. 18,081 (1996), *reprinted at* Petitioners' Appendix, at 64a-69a. Specifically, the Secretary must

provide public notice of his final decision to take land in trust at least 30 days before he transfers title to the United States. *Id.* at 69a. One objecting to the Secretary's decision may file suit to challenge the transfer before it occurs. *Id.*

Pre-existing regulations also limit the Secretary's discretion. For on-reservation trust acquisitions, the regulations require the Secretary to notify relevant state and local governments, and give such governments a period of time in which to submit written comments regarding the proposed acquisition's potential impacts on their regulatory jurisdiction, real property taxes and special assessments. *See* 25 C.F.R. sec. 151.10. The regulations contain similar provisions governing trust acquisition of off-reservation lands. *See* 25 C.F.R. sec. 151.11. In addition, the regulations define "Tribe," "individual Indian," and "Indian reservation," in ways that restrict the entities or persons for whom lands may be taken into trust. *See* 25 C.F.R. sec. 151.2(b), (c), (f). Moreover, the Secretary may only acquire land in trust when one of three conditions is met:

> (1) when the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or, (2) when the tribe already owns an interest in the land, or (3) when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

25 C.F.R. sec. 151.3(a).

In sum, far from interpreting his authority under the statute "as broadly as possible," *South Dakota v. United States*, 69 F.3d at 884, the Secretary has interpreted the IRA in a reasonable and limited way. Thus by not considering the delegation question "in light of [the] statute's legislative history and context, and any narrowing agency interpretation," *id.* (citations omitted), the court of appeal "has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power." S.Ct.R. 10(a).

IV. CONCLUSION

The court of appeal failed to consider key threshold questions, ignored settled rules of statutory construction, misread federal regulations, and erroneously concluded that the IRA, 25

U.S.C. section 465, is an unconstitutional delegation of legislative authority. If let stand, that opinion poses a significant threat to Indian tribal self-determination nationwide.

For these reasons, the San Manuel Band respectfully requests that this Court grant the United States Department of the Interior's petition for a writ of certiorari.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

DEPARTMENT OF THE INTERIOR ET AL. *v.*
SOUTH DAKOTA ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 95–1956. Decided October 15, 1996

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit with instructions to vacate the judgment of the United States District Court for the District of South Dakota and remand the matter to the Secretary of the Interior for reconsideration of his administrative decision.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR and JUSTICE THOMAS join, dissenting.

This case arises from the 1990 action of the Department of the Interior acquiring 91 acres in trust for the Lower Brule Tribe of the Sioux Indians, pursuant to §5 of the 1934 Indian Reorganizations Act (IRA), 48 Stat. 985, as amended, 25 U. S. C. §465. Respondents challenged this action in Federal District Court, contending both that the Department's particular action violated the Administrative Procedure Act (APA), 5 U. S. C. §706, and that the Secretary's statutory authority to acquire lands under the IRA is unconstitutional as a delegation of legislative power.

Throughout this litigation, until now, it has been the Department's position that IRA land acquisitions are unreviewable under the APA because they fall within the exception for matters "committed to agency discretion by law." §701(a)(2). The District Court agreed that APA review was unavailable, although on different grounds, holding that since the United States had

acquired title, the Quiet Title Act (QTA), 28 U. S. C. §2409a, provided the sole statutory means of challenging the action, and that the QTA explicitly prohibits actions challenging title to Indian lands. The District Court also upheld the Secretary's constitutional authority to acquire land on behalf of the United States under the IRA. The Court of Appeals for the Eighth Circuit, however, reversed on the ground that §5 of the IRA constitutes a delegation of legislative power to the Secretary of the Interior and is hence unconstitutional. 69 F. 3d 878 (1995).

Following the Eighth Circuit's sweeping decision, the Department of the Interior did an about-face with regard to the availability of judicial review under the APA. It promulgated a new regulation providing that "the Secretary shall publish in the Federal Register, or in a newspaper of general circulation serving the affected area a notice of his/her *[sic]* decision to take land into trust," and that "the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published." Department of the Interior, Land Acquisitions (Nongaming), 61 Fed. Reg. 18082 (1996) (to be codified at 25 CFR §151.12). The preamble to that regulation recites that it is being adopted "[i]n response to a recent court decision, *State of South Dakota* v. *U. S. Department of the Interior*, 69 F. 3d 878 (8th Cir. 1995)," and asserts that the procedure it sets forth "permits judicial review before transfer of title to the United States." The Solicitor General now represents to us that it is the position of the Department of the Interior, as well as that of the Department of Justice, that judicial review of an IRA land trust acquisition may be obtained by filing suit within the 30-day waiting period, although action will continue to be barred by the QTA after the United States formally acquires title.

The decision today—to grant, vacate, and remand in light of the Government's changed position—is both unprecedented and inexplicable. This Court has in

recent years occasionally entered a "GVR" in light of a position newly taken by the Solicitor General *where the United States was the prevailing party below*. See, *e.g.*, *Stutson* v. *United States*, 516 U. S. ___ (1996); *Schmidt* v. *Espy*, 513 U. S. ___ (1994); *Wells* v. *United States*, 511 U. S. 1050 (1994); *Reed* v. *United States*, 510 U. S. 1188 (1994); *Chappell* v. *United States*, 494 U. S. 1075 (1990). Even that extension of our earlier practice is in my view unsound. See *Stutson*, 516 U. S., at ___ (slip op., at 6–8) (SCALIA, J., dissenting). But we have never before GVR'd simply because the Government, having *lost* below, wishes to try out a new legal position. The unfairness of such a practice to the litigant who prevailed in the Court of Appeals is obvious. ("Heads I win big," says the Government; "tails we come back down and litigate again on the basis of a more moderate Government theory.") Today's decision encourages the Government to do what it did here: to "go for broke" in the Courts of Appeals, rather than get the law right the first time.

What makes today's action inexplicable as well as unprecedented is the fact that the Government's change of legal position *does not even purport to be applicable to the present case*. The Government now concedes only that APA review is available before the Secretary's taking of title under the IRA; it has not altered its view that once title has passed to the United States APA review is precluded by the QTA. 28 U. S. C. §2409a(a). Pet. for Cert. 7. Since in this case title has passed, the Government's position in the present litigation remains what it was: Judicial review is unavailable.

The Government contends, however, that the Court of Appeals' determination that the IRA was a delegation of legislative power was based in part upon the unavailability of judicial review. I fail to see how the availability of judicial review has anything to do with that question; perhaps the Court of Appeals thought otherwise, though its opinion on this point is somewhat

contradictory.* If, however, judicial reviewability *was* germane to the Court of Appeals' judgment, surely it was only such reviewability as would exist *of right*, and not such as would be accorded only at the discretion of the agency. It is merely the latter that we have here: The Government concedes only that, *if* the Secretary chooses to announce his acquisition decision *before* the acquisition becomes effective (as the new regulation graciously requires), judicial review is available. It is inconceivable that this reviewability-at-the-pleasure-of-the-Secretary could affect the constitutionality of the IRA in anyone's view, including that of the Court of Appeals.

Finally, the existence of the new regulation does not make this a case in which a postjudgment change in the law applicable to the dispute warrants a remand. The preamble to the regulation acknowledges that "the Eighth Circuit decision precludes the Secretary from taking into trust the land at issue in that particular case," and explicitly states that "[t]he procedure announced in today's rule . . . will apply to all *pending* and *future* trust acquisitions." 61 Fed. Reg., at 18083 (emphasis added). Of course that statement merely recites the obvious, since, title *already* having been acquired in this case, it is quite impossible for the Secretary to provide 30-day advance notice of intent to take title. Evidently for that reason, the Government asks this Court, if it declines to grant certiorari, not

*At one point the court quoted approvingly its statement in *United States* v. *Garfinkel*, 29 F. 3d 451, 459 (CA8 1994) that "[j]udicial review is a factor weighing in favor of upholding a statute against a nondelegation challenge." 69 F. 3d 878, 882 (1995). This seems inconsistent, however, with the approach the court takes elsewhere in its opinion, when it says: "We doubt whether the Quiet Title Act precludes APA review of agency action by which the United States *acquires* title. But given our conclusion that §465 is an unconstitutional delegation of power, we need not decide this issue." *Id.*, at 881, n. 1.

merely to GVR, but to do so "with instructions that the judgment of the district court sustaining the Secretary's decision also be vacated and that the matter, in turn, be remanded to the Secretary of the Interior for reconsideration and issuance of a new administrative decision." App. to Pet. for Cert. 25. I cannot imagine where we would derive the authority for this. If, as the Government asserts in its brief, statutory judicial review of a land-trust decision under §5 of the IRA is unavailable once title has passed to the United States, then certainly federal courts cannot construct the necessary conditions for judicial review by simply ordering the land acquisition undone.

In sum, there is no basis in precedent or in reason for a GVR in the present case. Since a federal statute has been held unconstitutional, I would grant the petition for certiorari.